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Bruce A. Green

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# **MAY JUDGES ATTEND PRIVATELY FUNDED EDUCATIONAL PROGRAMS? SHOULD JUDICIAL EDUCATION BE PRIVATIZED?: QUESTIONS OF JUDICIAL ETHICS AND POLICY**

*Bruce A. Green\**

## **INTRODUCTION**

Three private institutions devote significant resources to educating judges: the Foundation for Research on Economics and the Environment (FREE); the Law and Organizational Economics Center (LOEC) of the University of Kansas; and the Law and Economics Center (LEC) of the George Mason University School of Law.<sup>1</sup> Each of these institutions invites judges to attend free educational seminars, provides free food and lodging (in some cases, at resort settings), and wholly or partially reimburses the judges' travel expenses.<sup>2</sup> The various judicial seminars offered by these institutions are designed for and exclusively available to judges.<sup>3</sup> Each institution offers seminars addressing topics relating to law-and-economics. LEC and FREE also offer seminars relating to science, and FREE also offers seminars relating to the environment.<sup>4</sup> Dozens of entities—including foundations, corporations, and law firms—contribute to these institutions' judicial education pro-

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\* Bruce A. Green is a Stein Professor of Law at Fordham University School of Law and the director of the Louis Stein Center of Law and Ethics. This Article is based on the following report: Bruce A. Green, *Ethics of Judicial Education: An Analysis of Private Charitable Gifts for Judicial Learning* (Oct. 15, 1999). The report was prepared for three foundations—the Charles G. Koch Foundation, the Claude R. Lambe Foundation, and the Fred and Mary Koch Foundation, which retained the author to render, on a compensated basis, a report on the propriety of private foundation support for judicial education programs. *Id.* at 2, 32 n.16. Additionally, this Article draws on the author's remarks at a program entitled *Continuing Education for Federal Judges: Purpose, Problems and Public Perception—The Controversy Examined*. The Conference was sponsored by the American Bar Association (ABA) Standing Committee on Federal Judicial Improvements at the ABA's annual meeting in Chicago on August 5, 2001.

1. Bruce A. Green, *Ethics of Judicial Education: An Analysis of Private Charitable Gifts for Judicial Learning* app. B, at 5-25 (Oct. 15, 1999) [hereinafter *Ethics of Judicial Education*] (on file with the Fordham Urban Law Journal).

2. *Id.*

3. *Id.* at app. B, at 5, 11, 21.

4. *Id.* at app. B, at 11-12.

grams.<sup>5</sup> Hundreds of judges have attended at least one seminar, and many have attended more than one.<sup>6</sup>

Since at least 1979, privately funded programs for judicial education, particularly in the area of law-and-economics, have been the subject of public discussion<sup>7</sup> and often public criticism.<sup>8</sup> In 1980, the Institute for Public Representation at Georgetown University formally petitioned the United States Judicial Conference to address the question of whether the Code of Judicial Ethics allowed federal judges to attend such programs.<sup>9</sup> In 1993, the Alliance for Justice published a study that criticized the programs themselves for improper academic bias.<sup>10</sup>

Most recently, in July 2000, Community Rights Counsel (CRC) published a study focusing on judicial seminars relating to environmental law.<sup>11</sup> CRC argued that the seminars were a veiled effort to lobby the judiciary. CRC also called for a ban on private reimbursement of judges' expenses in attending educational programs.<sup>12</sup> The concerns expressed in the CRC report prompted a

5. *Id.* at app. B, at 5, 12-13, 19.

6. *Id.* at app. B, at 11.

7. See, e.g., Fred Barbash, *Large Corporations Bankroll Seminars for Federal Judges*, WASH. POST, Jan. 20, 1980, at A1; David Beckwith, *Judges Study Free Market Economics*, LEGAL TIMES OF WASH., Feb. 5, 1979, at 1; Walter Guzzardi, Jr., *Judges Discover the World of Economics*, FORTUNE, May 21, 1979, at 58; James Russell, *Law and the Economy: Mysteries of Money Disrobed for Judges*, MIAMI HERALD, Apr. 30, 1978, at F1.

8. See Jack Anderson, *State Dept. Obstructing Cambodia Aid*, WASH. POST, Oct. 29, 1979, at D27.

More than 100 federal judges have gone to sunny Florida for a crash course in conservative economics, courtesy of some of the biggest corporate fat cats that will ever appear before them as defendants.

A confidential memo in the Senate Judiciary Committee calls the seminars for judges "a brazen attempt by the Business Roundtable crowd to influence the enforcement of antitrust laws."

The internal memo adds: "Financing for the program comes from companies like Proctor & Gamble, IBM and General Electric . . . Isn't there any question about the ethics of judges accepting, even indirectly, the hospitality of defendants in federal cases?"

*Id.*

9. See Inst. for Pub. Representation, *Petition for the Adoption of Guidelines for Judicial Participation in Privately Sponsored Educational Programs for Federal Judges and Other Relief Before the United States Judicial Conference*, Aug. 29, 1980, reprinted in LEGAL TIMES OF WASH., Sept. 15, 1980, at 19 [hereinafter IPR Petition].

10. ALLIANCE FOR JUSTICE, *JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN* (1993).

11. CMTY. RIGHTS COUNSEL, *NOTHING FOR FREE: HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC'S TRUST* (2000).

12. *Id.* at 1-2.

spate of editorials criticizing privately-funded judicial education,<sup>13</sup> as well as a program aired by ABC's *20/20*, hosted by Barbara Walters, exposing so-called "Junkets for Judges."<sup>14</sup> Senators John Kerry and Russ Feingold supported a federal bill to bar federal judges from attending private seminars (Kerry-Feingold bill).<sup>15</sup>

The attendance of judges at programs sponsored by the three institutions has also sparked litigation. In a recent case, a party contended that a judge who had attended privately-funded seminars could not fairly preside over the action.<sup>16</sup> In another case, a judge planning to attend a seminar sponsored by FREE raised the question whether he must therefore recuse himself "out of an abundance of caution and fairness."<sup>17</sup>

Notwithstanding these expressions of concern, judicial organizations such as the Judicial Conference of the United States have permitted judges to attend privately-funded seminars. Individual judges, determining that their attendance does not contravene applicable legal or ethical restrictions, have done so. In May 2001, in remarks to the American Law Institute, Chief Justice Rehnquist defended privately funded programs as "a valuable and necessary source of education in addition to that provided by the Federal Judicial Center."<sup>18</sup> Chief Justice Rehnquist joined the Judicial Conference of the United States and the Board of the Federal Judicial Center in opposing the Kerry-Feingold bill.

The first parts of this Article address questions of judicial ethics raised by privately-funded judicial seminars and how they are an-

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13. See, e.g., Editorial, *A Blot on Judicial Ethics*, WASH. POST, July 28, 2000, at A24; Editorial, *A Threat to Judicial Ethics*, N.Y. TIMES, Sept. 15, 2000, at A34; *Just Say No to Judge Junkets*, USA TODAY, May 1, 2001, at 14A; Editorial, *Mr. Rehnquist on Junkets*, WASH. POST, May 20, 2001, at B6.

14. *20/20: Junkets for Judges* (ABC television broadcast, Apr. 6, 2001).

15. The Judicial Education Reform Act of 2000, S. 2990, 106th Cong. (Kerry-Feingold Bill).

16. *In re Aguida*, 241 F.3d 194, 198 (2d Cir. 2001). As discussed below, both the district court and the court of appeals rejected the argument. See *infra* notes 105-125 and accompanying text. Likewise, in *Marshall v. Marshall*, No. 276, 815-407 (Harris Co. Probate Ct.), cited in Susan Borreson, *Fears of Influence: Judges Say Seminar Sponsors Hold No Sway in Court*, TEX. LAW., Sept. 20, 1999, at 1, the court ruled that the presiding judge's attendance at an LOEC program did not create the appearance of impropriety and was not grounds for recusal. See Susan Borreson, *Fears of Influence: Judges Say Seminar Sponsors Hold No Sway in Court*, TEX. LAW., Sept. 20, 1999, at 1.

17. See *Zuniga v. Koch Midstream Servs. Co.*, No. MO-98-CA-169-F (W.D. Tex. Aug. 12, 1999) (Ferguson, J.).

18. Remarks by Chief Justice William H. Rehnquist before the American Law Institute Annual Meeting (May 14, 2001), [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_05-14-01.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_05-14-01.html).

swered by existing legal and ethical standards. Part I discusses the relevant restrictions and describes the courts' determination that these restrictions do not bar judges' participation in judicial seminars. Part II considers whether this determination is rooted in a reasonable understanding of existing restrictions and concludes that it is. There is ample support for the view that judges may ordinarily attend educational seminars at no cost to themselves and have their expenses reimbursed. There is also ample reason to conclude that judges who attend judicial seminars are generally not required to recuse themselves from cases involving a party or affiliate that contributed to the educational institution that organized and sponsored the seminar.

Part III considers whether the existing standards and processes that judges have used to address the controversy are sufficient. It concludes that these standards and processes do not completely resolve the controversy. The question of whether judges should attend privately-funded judicial seminars is not solely a question of individual judges' ethics to be resolved by self-regulation. It is also a question of judicial policy that should be resolved by the judiciary as an institution. The question is, in essence, whether judicial education should be privatized. This question is posed uniquely by LEC, FREE, and LOEC, the only private institutions regularly offering expenses-paid judicial seminars oriented toward a particular perspective on legal questions that come regularly before the courts.

In considering these questions, the Article focuses particularly on law-and-economics seminars, which have existed the longest and have been criticized the most. The Article begins with a factual assumption central to criticisms of judges' participation in these seminars—namely, that the seminars are “biased” in the following sense: although there is room for debate about whether, to what extent, and how economics principles should be employed in various legal contexts, the directors of these programs hold particular views on these questions that influence how they organize the seminars and to whom they teach them.<sup>19</sup> In particular, the pro-

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19. See, e.g., Beckwith, *supra* note 7, at 1 (quoting unnamed FTC economist: “[The economics course sponsored by LOEC is] an intellectually-respectable course . . . and the reading list brackets all schools . . . . But it has a distinct Chicago school flavor to it: it gets across a certain free market point of view, that there are plenty of competitive forces out there and regulation by government isn’t necessary. I would certainly hope that judges didn’t rely solely on this approach . . . .”); *id.* (quoting an unnamed economist: “[The LOEC course instruction was] rather cleverly given the appearance of neutrality, but is actually stacked in favor of the Chicago school.”)

gram directors favor the application of “free market” economics principles<sup>20</sup> in situations where individuals with a different legal philosophy would employ alternative approaches to developing or interpreting the law.<sup>21</sup> Contributors generally share the legal philosophy of those who direct the various educational institutions.<sup>22</sup> Further, contributors anticipate that some judges, having attended these seminars, will be more inclined to employ economics principles that accord with the contributors’ philosophy.<sup>23</sup> Whether the seminars are academically “biased” in the above sense,<sup>24</sup> or in other senses, is a question that, until now, judicial institutions have not thought necessary to resolve. Apparently, the judiciary believes that it is permissible for judges to participate even if charges of bias are true. This Article concludes that the judiciary is right as a matter of existing judicial regulation, but that the inquiry should not end with the application of existing laws and rules of judicial ethics.

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20. For instance, LOEC’s literature indicates that its Economics Institute for State Judges “emphasizes,” among other things, that “Competitive markets, private ownership, and freedom of contract promote the efficient use of resources and provide a continual stimulus for innovation”; that “Profits direct business toward socially beneficial activities that increase wealth”; and that through “the ‘Invisible Hand’ Principles,” “market prices bring personal self interest and the general welfare into harmony.” Law and Organizational Economics Center (L.O.E.C.), Economics Institute for State Judges, <http://www.loec.org/recruiting2.html> (visited August 12, 1999).

21. For example, the LOEC’s 1998-99 annual report stated: “The goal of the LOEC’s Judicial Education Programs is to provide state judges with a basic understanding of economic concepts that often are at the heart of legal disputes and, as an intended by-product, foster a greater appreciation of entrepreneurship, free markets, private property rights, and the rule of law.”

22. See, e.g., Charles Koch, *Empowering the Entrepreneur Within*, CHIEF EXECUTIVE, Mar. 1998, at 46-49 (extolling the virtues of free market principles and explaining means in which company’s management philosophy can harness the power of free market ideas).

23. See John J. Fialka, *How Koch Industries Tries to Influence Judicial System*, WALL ST. J., Aug. 9, 1999, at A20 (“The seminars illustrate how, in recent years, Koch has sought to influence thinking in the judicial system.”)

24. It should be noted that the question of whether an educational program is academically “biased” is separate and distinct from the question, addressed later in this Article, of whether a judge’s participation in extrajudicial activities may give rise to an impermissible judicial bias (e.g., whether it may lead a judge to impermissibly favor a party). See text accompanying notes *infra* 153-79.

## I. BACKGROUND TO THE QUESTIONS OF JUDICIAL REGULATION

### A. Generally Applicable Restrictions

When presiding over judicial proceedings, judges are required to be neutral and impartial.<sup>25</sup> To insure an impartial judiciary, judges' extrajudicial conduct and relationships are subject to various bodies of regulation. These include the Constitution's Due Process Clause,<sup>26</sup> federal and state statutes,<sup>27</sup> and codes of judicial ethics.<sup>28</sup> Together, these are intended to promote public confidence in the integrity of the judicial system.

#### 1. Constitutional Requirements

As interpreted by the Supreme Court and other courts, the Due Process Clause sometimes requires judges to "recuse themselves when they face possible temptations to be biased, even when they exhibit no actual bias against a party or a case."<sup>29</sup> Although the common law rule was that a judge would be "disqualified for direct pecuniary interest and nothing else,"<sup>30</sup> the constitutional rule goes somewhat further. The Due Process Clause requires disqualification where the judge has a direct pecuniary or other interest in the outcome of the case, so that there is a significant incentive for a judge to favor one side.<sup>31</sup> The constitutional provision does not

25. See, e.g., *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955).

26. U.S. CONST. amend. XIV.

27. See, e.g., 5 U.S.C. §§ 101-111 app. 4 (West 2001) (requiring judges to disclose certain financial information); MASS. ANN. LAWS ch. 268B, § 5 (Law. Co-op. 1992) (same).

28. The federal judiciary, and most state judiciaries, have adopted, with different degrees of variation, a code of conduct drafted by the American Bar Association. As of May 1999, twenty-three states had adopted new codes of judicial conduct based on the 1990 ABA Model Code of Judicial Conduct. Memorandum of Cynthia Gray, Director, Center for Judicial Conduct Organizations, American Judicature Society (undated) (on file with author).

29. *Del Vecchio v. Ill. Dep't of Corrections*, 31 F.3d 1363, 1372 (7th Cir. 1994).

30. See John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609, 618-19 (1947) ("The common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and nothing else . . . . Disqualification for bias represents a complete departure from common law principles.").

31. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (decision in case would set legal precedent bearing directly on two pending cases filed by judge as plaintiff); *Ward v. City of Monroeville*, 409 U.S. 57, 60 (1972) (city mayor could not sit as traffic court judge because responsibility for town finances provided incentive to find against defendants to "maintain the high level of contribution from the mayor's court"); *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (judge could not try defendant for contempt of court based on defendant's insults during previous trial, be-

require recusal, however, where there are other conceivable reasons for a judge to be biased. For example, even though they may offer a "possible temptation" to be biased, "[m]atters of kinship [or] personal bias . . . would generally be matters of legislative discretion."<sup>32</sup> As one court has explained:

This merely recognizes, at least implicitly, that in the real world, "possible temptations" to be biased abound. Judges are human; like all humans, their outlooks are shaped by their lives' experiences. It would be unrealistic to suppose that judges do not bring to the bench those experiences and attendant biases they may create. A person could find something in the background of most judges which in many cases would lead that person to conclude that the judge has a "possible temptation" to be biased. But not all temptations are created equal. We expect—even demand—that judges rise above these potential biasing influences, and in most cases we presume judges do.

. . . .

As the common law recognized, and as experience teaches, the lure of lucre is a particularly strong motivation, and therefore judges ought to be prohibited from presiding over cases in whose outcomes they have a direct financial interest. Of course, the Supreme Court has held that the due process clause requires disqualification for interests besides pecuniary interests. But the constitutional standard the Supreme Court has applied in determining when disqualification is necessary recognizes the same reality the common law recognized: judges are subject to a myriad of biasing influences; judges for the most part are presumptively capable of overcoming those influences and rendering evenhanded justice; and only a strong, direct interest in the outcome of a case is sufficient to overcome that presumption of evenhandedness.<sup>33</sup>

Thus, for the most part, the Constitution leaves questions of judicial disqualification, and judicial ethics generally, to be decided by legislators through the enactment of relevant statutes, by the judiciary through the adoption and interpretation of codes of judicial ethics, and by judges individually.<sup>34</sup>

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cause defendant's insults were "apt to strike 'at the most vulnerable and human qualities of a judge's temperament'"); *Tumey v. Ohio*, 273 U.S. 510 (1927) (judge in criminal case was paid only if defendant was convicted).

32. *Aetna Life Ins.*, 475 U.S. at 820; see also *Tumey*, 273 U.S. at 523.

33. *Del Vecchio*, 31 F.3d at 1372-73.

34. *Id.* at 1391 (Easterbrook, J., concurring).



## 2. Statutory Requirements

Various federal and state statutes impose restrictions beyond the constitutional ones.<sup>35</sup> Of course, criminal law forbids judges from seeking or accepting a bribe;<sup>36</sup> however, there is no plausible way of construing invitations to the judicial seminars as a bribe.<sup>37</sup> Of greater relevance here are statutes requiring judges to recuse themselves in circumstances where they have, or appear to have, a bias or interest that would influence their decisions. For example, the federal disqualification statute, which dates back to 1911,<sup>38</sup> requires a judge to disqualify himself in any proceeding where his impartiality might reasonably be questioned.<sup>39</sup> The statute also identifies particular circumstances in which a judge must disqualify himself, including "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concern-

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35. See, e.g., 5 U.S.C.A., §§ 101-111 app. 4 (West 2001) (requiring judges to make certain financial disclosures); MASS. ANN. LAWS ch. 268B, § 5 (Law. Co-op 1992) (same).

36. For example, a federal criminal statute makes it a crime for a federal judge to seek or accept compensation in relation to any proceeding, request for a ruling, or other determination or matter involving the United States. 18 U.S.C. § 203(a) (2000).

37. Under either federal or state law, it would be a crime to give a judge a bribe or gratuity—that is, generally speaking, to provide something of value to a judge in order to influence, or in return for, the judge's performance of an official act. See, e.g., 18 U.S.C. § 201. But no one has argued that contributors to institutions that conduct judicial seminars are engaged in bribery, and such a claim would not be plausible. There is no claim that contributors give anything directly to judges, control the educational institutions that directly deal with judges, or decide which judges are invited to participate. Nor is there any indication that contributors seek or expect to receive anything from judges in exchange for their contributions. For example, there are no reports that, when they appear as parties in litigation before judges who have attended a judicial seminar, contributors call their role to the judges' attention. Nor is there any other reason to believe that contributors expect that, in gratitude for supporting judicial seminars, judges who attend the seminars will favor the contributors themselves or their corporate and individual affiliates. Such an expectation would be foolish. It is doubtful that judges themselves would even take note of such contributions were they not called to the judges' attention by the media or another party. See, e.g., Barbash, *supra* note 7, at A3 ("Most of the judges interviewed said they had been unaware of the corporations sponsoring the seminars. Most also said that the corporate sponsorship did not concern them."). Rather, the principal concerns are centered on the impact of judicial seminars on judges' general judicial philosophy and on judges' understanding of how to resolve particular legal questions, regardless of which parties are involved in a particular lawsuit.

38. See generally Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 663-80 (1985) (describing federal disqualification statutes and their history); Randall J. Litteneker, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 236 n.4 (1978).

39. 28 U.S.C. § 455(a) (2000).

ing the proceeding";<sup>40</sup> where he worked on the matter while in private practice or as a government employee;<sup>41</sup> and where he or a close family member has a financial interest or other interest or involvement in the controversy.<sup>42</sup> The federal disqualification statute requires a judge to "inform himself about his personal and fiduciary financial interests,"<sup>43</sup> in order to decide whether disqualification is required.

Various state and federal laws also require judges to disclose certain financial information.<sup>44</sup> For example, federal law requires federal judges to file annual financial disclosure forms.<sup>45</sup> These forms identify and describe all gifts of more than a minimal amount received in the prior year (except when received from a relative or, in the case of food, lodging, or entertainment, as "personal hospitality"),<sup>46</sup> and all reimbursements in more than minimal amounts received in the prior year.<sup>47</sup> Additionally, certain state laws applicable to government officials generally, or to judges in particular, impose further restrictions on state judges, including restrictions on their receipt of gifts.<sup>48</sup>

### 3. *Codes of Conduct*

Finally, judges are regulated by judicial codes of conduct adopted by state and federal judiciaries to govern the conduct of judges. The federal judiciary and most state judiciaries have adopted, with different degrees of variation, a code of conduct drafted by the American Bar Association.<sup>49</sup> The earliest judicial

40. 28 U.S.C. § 455(b)(1).

41. 28 U.S.C. § 455(b)(2), (3).

42. 28 U.S.C. § 455(b)(4), (5).

43. 28 U.S.C. § 455(c).

44. *See, e.g.*, FLA. CONST. art. 2, § 8; 5 U.S.C., §§ 101-111, app. 4; MASS. ANN. LAWS ch. 268B, § 5 (Law. Co-op 1992); OKLA. STAT. ANN. tit. 5, ch. 1, app. 4 (West 2001); PA. CONS. STAT. ANN. §§ 1104-1105 (West 2000).

45. 5 U.S.C.A., app. 4, §§ 101-111 (West 2001).

46. 5 U.S.C.A., app. 4, § 102(a)(2)(A).

47. 5 U.S.C.A., app. 4, § 102(a)(2)(B).

48. *See, e.g.*, CAL. CIV. PRO. CODE § 170.9 (West 2002); GA. CODE ANN. § 21-5-11 (1998); 5 ILL. COMP. STAT. ANN. 425/1-10 (West Supp. 2001); MD. CODE ANN., STATE GOV'T § 15-505 (2001); MASS. ANN. LAWS ch. 268A §§ 2-3 (Law. Co-op 1992); OHIO. REV. CODE ANN. § 120.03(E) (West 2001); 65 PA. CONS. STAT. ANN. § 1103(c); TEX. GOV'T CODE ANN. § 572.051 (Vernon 2000); VA. CODE ANN. § 2.1.-639.4 (Michie 1997); WASH. REV. CODE ANN. § 42.52.140-150 (West 2000). *See also* discussion *infra* at notes 203-19 and accompanying text.

49. As of May 1999, twenty-three states had adopted new codes of judicial conduct based on the 1990 ABA Model Code of Judicial Conduct. (All of these, however, deviated from the 1990 model to some degree). Additionally, twenty-four other states had revised their existing judicial codes (which were generally based on the

code, the ABA Canons of Judicial Conduct, was drafted by a committee under the direction of Chief Justice Taft and approved by the ABA in 1924.<sup>50</sup> This early code was comprehensively reviewed from 1969 to 1972 by an ABA committee chaired by retired Chief Justice Roger J. Traynor of the California Supreme Court and comprised of thirteen members, including Supreme Court Justice Potter Stewart and five other state or federal judges.<sup>51</sup> The committee produced the Code of Judicial Conduct that was approved by the ABA in August 1972.<sup>52</sup> The Code was substantially amended in 1990, based on the work of a drafting committee that, again, included the substantial participation of judges.<sup>53</sup> The existing Code is, thus, a contemporary document; it is the product of considerable work, public discussion and deliberation by lawyers and judges reflecting a range of backgrounds and perspectives that builds on decades of prior work and judicial tradition. The general principles embodied in the Code were not lightly conceived and deserve respect.

In general, the Code enjoins judges to maintain a "high standard of conduct"<sup>54</sup> and to "promote public confidence in the integrity and impartiality of the judiciary."<sup>55</sup> Among the specific provisions

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1972 ABA model) to incorporate some or many provisions of the 1990 model. Likewise, the United States Judicial Conference revised its former code (based on the 1972 ABA model) to add new material, including provisions based on the 1990 model. Memorandum of Cynthia Gray, Director, Center for Judicial Conduct Organizations, American Judicature Society (undated) (on file with Fordham Urban Law Journal).

50. See LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* (1992).

51. *Id.*

52. See E. WAYNE THODE, *REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT* (1973).

53. See MILORD, *supra* note 50.

54. Canon 1 of the MODEL CODE OF JUDICIAL CONDUCT (1990), titled "A Judge Shall Uphold the Integrity and Independence of the Judiciary," provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

55. Canon 2 of the MODEL CODE OF JUDICIAL CONDUCT (1990), titled "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities," provides in part:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or

intended to ensure fair and impartial judicial decision making are those forbidding judges from engaging in *ex parte* communications concerning pending or imminent proceedings<sup>56</sup> and requiring judges to recuse themselves when they have “a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.”<sup>57</sup>

Of most direct relevance to the question of whether judges may attend privately-funded judicial seminars are various provisions addressing judges’ extrajudicial activities.<sup>58</sup> Canon 4(B), for instance,

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others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge . . . .

56. Canon 3 of the MODEL CODE OF JUDICIAL CONDUCT (1990), titled “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently,” provides in part:

(7) A judge shall not initiate, permit, or consider *ex parte* communications, or consider communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

. . . .

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

57. Canon 3 of the MODEL CODE OF JUDICIAL CONDUCT (1990) further provides in part:

**E. DISQUALIFICATION**

(i) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

A judge shall keep informed about the judge’s personal and fiduciary economic interests . . . .

58. Canon 4 of the MODEL CODE OF JUDICIAL CONDUCT (1990), titled, “A Judge Shall So Conduct the Judge’s Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations,” provides in part:

**A. EXTRA-JUDICIAL ACTIVITIES IN GENERAL.** A judge shall conduct all of the judge’s extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge’s capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

**B. VOCATIONAL ACTIVITIES.** A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

**C. GOVERNMENTAL, CIVIC OR CHARITABLE ACTIVITIES.**

. . . .

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization . . . devoted to the improvement of the law, the legal

generally authorizes a judge to “speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects.” Canon 4(H)(1) generally authorizes a judge to “receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge’s performance of judi-

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system or the administration of justice or of an educational . . . organization not conducted for profit, [subject to other Code provisions and specified limitations, such as that the organization may not be engaged in proceedings or likely proceedings that would ordinarily come before the judge or the judge’s court, and that the judge is restricted from participating in fund-raising or solicitation of members] . . . .

#### D. FINANCIAL ACTIVITIES.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge’s judicial position . . . .

(5) A judge shall not accept . . . a gift, bequest, favor or loan from anyone except for:

(a) . . . books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge’s spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(c) ordinary social hospitality;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation under Section 4H.

#### H. COMPENSATION, REIMBURSEMENT AND REPORTING.

(1) COMPENSATION AND REIMBURSEMENT. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge’s spouse or guest. Any payment in excess of such an amount is compensation.

(2) PUBLIC REPORTS. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received . . . .

cial duties or otherwise give the appearance of impropriety." Canon 4(D)(5)(g) specifically authorizes a judge to accept "a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants." Canon 4(D)(5)(h) permits a judge, subject to a reporting requirement, to accept "any other gift, bequest, favor or loan . . . if . . . the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge."<sup>59</sup> Conduct authorized by these provisions is subject to the general admonition that judges must conduct their "extra-judicial activities so that they do not . . . cast reasonable doubt on the judge's capacity to act impartially as a judge; . . . demean the judicial office; or . . . interfere with the proper performance of judicial duties."<sup>60</sup>

To the extent that the judicial codes require interpretation, guidance is offered by various judicial bodies and bar association committees that issue advisory opinions, typically in response to inquiries from judges. Among these are the Advisory Committee on Codes of Conduct of the United States Judicial Conference, which gives advice to federal judges. To a large extent, however, within the framework of the applicable judicial code, questions are left to individual judges' discretion.<sup>61</sup>

### **B. The Judiciary's Perspective on Privately-Funded Seminars**

Individual judges have discretion to conclude that, to avoid "the appearance of impropriety"<sup>62</sup> or for other reasons, they should not attend privately-supported judicial seminars in science, the environment, or law-and-economics. However, over the past two decades, judicial organizations and a significant number of individual judges have seemingly concluded that applicable law and judicial codes do not forbid judges from attending.<sup>63</sup> Hundreds of judges

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59. MODEL CODE OF JUDICIAL CONDUCT (1990).

60. MODEL CODE OF JUDICIAL CONDUCT Canon 4(A) (1990).

61. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1306 (1974) (answering the question of whether a judge may preside in a case in which a party is represented by a lawyer of the judge's former law firm: "The decision is the judge's to make, not the attorney's . . . 'In the final analysis it must be left to the good judgment and conscience of the individual judge'"); Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 95-4 (Apr. 7, 1995) (answering the question whether to occasionally accept books from a publisher that does business in the court: "Justices and judges must use their discretion."). See generally Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROB. 3 (1970).

62. MODEL CODE OF JUDICIAL CONDUCT Canon 4(H)(1)(1990).

63. Ethics of Judicial Education, *supra* note 1, at 10.

have participated in these privately-supported seminars. Judicial advisory bodies, while aware of objections to judges' participation, have not cautioned judges against doing so.

The popularity of the judicial seminars is significant because for the most part, judges regulate their own conduct. At the federal level and in the large majority of states, official organizations interpret the judicial codes with the objective of providing guidance to judges.<sup>64</sup> These organizations are unquestionably aware of privately funded judicial education and its popularity with judges. There are no reports of any judicial body having prohibited judges from attending private seminars. Individual judges also have a personal responsibility to apply ethics provisions to their own conduct. Many have indicated by participating in judicial seminars that they see no legal or ethical impediment to doing so.

The law-and-economics programs have existed since at least 1974, when the Law and Economics Center was founded by Henry G. Manne.<sup>65</sup> The existence of these judicial education programs and their corporate and foundation sponsorship has been public knowledge for decades.<sup>66</sup> In August 1980, shortly after criticisms were first raised in the media—and, reportedly, in Congress<sup>67</sup>—the United States Judicial Conference's Advisory Committee on Codes of Conduct issued Advisory Opinion 67.<sup>68</sup> The specific question presented was "whether judges may with propriety attend seminars and similar educational activities organized by non-governmental entities and may have the expenses of their attendance paid by such entities."<sup>69</sup> The committee concluded that judges may do so. It reasoned that "Payment of tuition and expenses involved in attendance at non-government sponsored seminars" is a gift that judges are specifically authorized to accept under provisions of the federal judicial code (corresponding to current Canons 4(D)(5)(g) and (h) of the ABA Code), which permit judges to accept a fellowship or scholarship "awarded on the same terms applied . . . to other applicants," or to accept any other gift "so long as the donor

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64. See, e.g., *infra* notes 149-52 and accompanying text.

65. For a description of the three major sponsors of judicial education programs see CMTY. RIGHTS COUNSEL, *supra* note 11, at 11-17; see also *supra* text accompanying notes 1-7

66. *Supra* note 7.

67. *Supra* note 8.

68. U.S. Judicial Conference, Advisory Comm. on Codes of Conduct, Advisory Op. 67 (revised 1998).

69. *Id.*

is not a party in litigation before, and its interests are not likely to come before, the invited judge.”<sup>70</sup> The opinion explained:

The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and are trained to weigh them.<sup>71</sup>

The opinion noted the following limitation, however:

It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics to be covered in the seminar are likely to be in some manner related to the subject matter of such litigation.<sup>72</sup>

The opinion further stated that judges have an individual responsibility to satisfy themselves that their participation would be permissible:

If there is a reasonable question concerning the propriety of participation, the judge should take such measures as may be necessary to satisfy himself or herself that there is no impropriety. To the extent that this involves obtaining further information from the sponsors of the seminar, the judge should make clear an intent to make the information public if any question should arise concerning the propriety of the judge’s attendance.<sup>73</sup>

Finally, the opinion concluded that “Judges who accepted invitations to participate in such seminars, having been satisfied that no impropriety or appearance thereof is present, must report the reimbursement of expenses and the value of the gift on their financial disclosure reports.”<sup>74</sup>

Advisory Opinion 67 did not necessarily compel the conclusion that judges may attend law-and-economics seminars, although it did place the burden on judges to resolve for themselves questions about the propriety of participating.<sup>75</sup> Although the Advisory Committee may well have had the LEC’s programs in mind, the opinion did not refer to the law-and-economics seminars or any

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. U.S. Judicial Conference, Advisory Comm. on Codes of Conduct, Advisory Op. 67 (1998) [hereinafter Adv. Op. 67].

75. *Id.*



other particular seminar. Further, while the opinion reasoned that a program's lack of balance (i.e., "[t]hat a lecture or seminar may emphasize a particular viewpoint or school of thought")<sup>76</sup> "does not *in itself* preclude a judge from attending,"<sup>77</sup> the opinion did not foreclose an argument that other aspects of a program, such as the lavishness of the setting where the seminar was conducted, combined with the imbalanced nature of instruction, might preclude judges' participation. Further, the opinion did not foreclose an argument that judges should not participate because the seminars are funded by corporations, or by foundations affiliated with corporations, that may become parties in litigation involving law-and-economics issues like those addressed in the seminars. Nonetheless, subsequent events made clear that the Advisory Opinion meant generally to permit federal judges to participate in programs such as those of LEC.

Days after Advisory Opinion 67 was issued, the Institute for Public Representation petitioned the United States Judicial Conference to provide further guidance.<sup>78</sup> The petition specifically addressed the programs of the Law and Economics Center, then located at the University of Miami Law School.<sup>79</sup> By that time, approximately 145 federal judges had reportedly attended these programs.<sup>80</sup> The United States Judicial Conference declined to review the LEC's judicial seminars in detail or to adopt guidelines for judicial participation in privately-funded programs. According to the Alliance for Justice, Judge Howard Markey, who then chaired the Advisory Committee on Codes of Conduct, responded to the petition by citing Advisory Opinion 67 and noting that the "advice in Opinion 67 that judges invited to educational seminars inform themselves is deemed fully adequate."<sup>81</sup> Reportedly, at around the same time, the Advisory Committee's private advice to individual judges was that participation in LEC's programs was permissible.<sup>82</sup>

Public concerns were renewed in 1993 when the Alliance for Justice issued a report criticizing judges' attendance at law-and-economics

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76. *Id.*

77. *Id.* (emphasis added).

78. See IPR Petition, *supra* note 9, at 19; see also ALLIANCE FOR JUSTICE, *supra* note 10.

79. IPR Petition, *supra* note 9, at 19.

80. *Id.*

81. ALLIANCE FOR JUSTICE, *supra* note 10, at 74.

82. See Barbash, *supra* note 7, at A3 ("D.C. District Court Judge June Green . . . said she was aware of the corporate sponsorship but sought and received approval of the U.S. judges' ethics committee before attending [an LEC program].")

nomics programs.<sup>83</sup> The following year, United States District Judge Jack B. Weinstein addressed this report in a twenty-six page law review article—the first in a three-part series—dealing in depth with the question of how judges learn.<sup>84</sup> The article specifically reviewed criticisms of judicial education programs of the Law and Economics Center (now located at the George Mason University School of Law)<sup>85</sup> as well as criticisms directed at conferences at Yale Law School and New York University Law School exclusively sponsored by Aetna Casualty and Life.<sup>86</sup> The criticisms directed at the LEC programs charged that the programs were ideologically biased toward advancing corporations' financial interests<sup>87</sup> and that judges were enticed by the resort locations to take the courses.<sup>88</sup> Although Judge Weinstein suggested ways of reducing concerns about the bias of judicial education programs,<sup>89</sup> he generally dismissed the Alliance's criticisms as unsound.<sup>90</sup> He took the view

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83. ALLIANCE FOR JUSTICE, *supra* note 10, at 71-75.

84. Hon. Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How Many Judges Learn*, 36 ARIZ. L. REV. 539 (1994) [hereinafter Weinstein, *How Many Judges Learn*]; see also Hon. Jack B. Weinstein, *Learning, Speaking, and Acting: What Are the Limits for Judges?*, 77 JUDICATURE 322 (1994); Hon. Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1 (1994).

85. Weinstein, *How Many Judges Learn*, *supra* note 84, at 546-52.

86. *Id.* at 545-46.

87. ALLIANCE FOR JUSTICE, *supra* note 10, at 72-74.

88. *Id.* at 72.

89. Among other things, Judge Weinstein suggested that educational institutions sponsoring judicial seminars "should make every effort to use general university funds or obtain funding from a sufficiently broad spectrum of donors so that the suspicion of bias is minimized." Weinstein, *How Many Judges Learn*, *supra* note 84, at 546. Judge Weinstein also suggested that rather than allowing a corporate sponsor to pay for the judge's expenses (as in the case of the Yale and N.Y.U. programs), the law school or the federal Administrative Office or Judicial Center should fund the programs. *Id.* In Judge Weinstein's judgment, funding from groups that frequently litigate was more suspicious than funding supplied by private, non-corporate foundations, which seldom participate in litigation and have little to gain from judicial decisions. *Id.* at 547. Judge Weinstein also argued that joint sponsorship of judicial seminars by educational and judicial institutions should be encouraged and, if sufficient funding was available, "it would be best to have much of the training paid for by the most neutral source of all—the government." *Id.* at 548. Judge Weinstein wrote that "Providing comfortable settings for education may be objectionable if carried to an extreme, since the public believes it pays [judges] enough and perks are resented by taxpayers." *Id.* at 550. Judge Weinstein also felt that judges certainly should be able to rely on the sponsor of the program to disclose biases in the presentations, *id.* at 553, and that judicial seminars should be publicized and, if non-public, "a record of attendance should be kept with the clerk of the court, should inquiry be made." *Id.* at 556.

90. *Id.* at 547. Judge Weinstein took the view that "The fact that sponsorship is by an accredited law school provides the judge with a buffer and assurance of impartial-

that ordinarily "[j]udges should be encouraged to gain as much general knowledge as possible, preferably from sources not tainted by venal or extreme ideological views."<sup>91</sup> Although the Alliance charged that LEC presented biased programs, Judge Weinstein concluded that judges should not be deterred from attending conferences espousing a certain viewpoint and noted that "[m]ature and experienced judges' thoughts can seldom be rechanneled by an instructor's bias."<sup>92</sup> Nor did he agree that the programs necessarily should be held at less lavish settings.<sup>93</sup> Other federal judges, although not at such length, have also publicly expressed the view that attendance at the various judicial seminars in law and economics is permissible.<sup>94</sup>

More recently, questions were directed to the federal judiciary during committee hearings of the House of Representatives on June 11, 1998.<sup>95</sup> At the hearings, Representative Zoe Lofgren raised a question about federal judges' attendance at all-expense-paid seminars and observed that the federal judiciary, as an entity, ought to provide some guidance.<sup>96</sup> In response, District Judge William Terrell Hodges noted that opinions of the Advisory Committee on Codes of Conduct already dealt with the question.<sup>97</sup> Additionally, Judge Hodges indicated that he would ask the committee to reexamine the question.<sup>98</sup> A month later, on July 10, 1998, the committee issued a slightly revised Opinion 67 which adhered to the earlier conclusion.<sup>99</sup>

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ity" and that the "criticism of the lush settings for the courses is not . . . entitled to much weight" because, given the amount of work, "these courses can hardly be characterized as jaunts." *Id.* at 548.

91. *Id.* at 565.

92. *Id.* at 552.

93. *Id.* at 550.

94. See, e.g., *Perception of a Conflict*, BANGOR DAILY NEWS, Apr. 29, 1998 ("[U.S. District Judge Gene] Carter defended his attendance [at a FREE seminar] by arguing that judges needed 'all the training and education they can get in areas like science, economics and technology in today's world of increasingly complex litigation.'")

95. *Oversight Hearings on the United States Judicial Conference, Administrative Office, And Federal Judicial Center, Protecting Small Business Act of 1998: Hearing on H.R. 3578 Before the Subcomm. on Courts of the Comm. of the Judiciary and Intellectual Property of the House Judiciary Comm.*, 105th Cong. (1998) [hereinafter *Oversight Hearing*] (on file with the FORDHAM URBAN LAW JOURNAL).

96. *Id.* at 33.

97. *Id.* at 34.

98. *Id.* at 37.

99. U.S. Judicial Conference, Advisory Comm. on Codes of Conduct, Op. 67 (1998).

At the state level, there is awareness of the judicial seminars, but no advisory opinion precludes state judges' attendance.<sup>100</sup> On the contrary, there are indications that representative bodies have considered the question and either approved judges' attendance or, in the very least, affirmatively decided not to disapprove it.<sup>101</sup> According to Henry Butler, the Director of LOEC at University of Kansas, the Conference of Chief Justices approved his programs.<sup>102</sup> Likewise, the then-president-elect of the American Judges Association reportedly stated that, as a rule, state judges' attendance at judicial seminars is permissible.<sup>103</sup>

Perhaps the most compelling evidence that, from judges' perspective, attendance at privately funded judicial education programs is not legally or ethically proscribed is the continued popularity of these programs with a wide segment of the state and federal judiciary. As of late 1999, more than 500 federal judges and 450 state judges had attended a program sponsored by one of

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100. This Article reflects a review of relevant judicial ethics advisory opinions from some twenty states: California, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Virginia, and Washington.

101. Ethics of Judicial Education, *supra* note 1, at 13.

102. Henry N. Butler, *Judges' Economics Classes Not Improper*, WICHITA EAGLE, Aug. 12, 1999, at A6.

The funding sources for [LOEC's] programs have been reviewed by the Conference of Chief Justices. I had cleared the funding sources of the program with Chief Justice Ellen Peters of the Connecticut Supreme Court (who at the time was serving as chair of the Conference of Chief Justices) prior to holding our first institute in December 1995. Indeed, Chief Justice Peters told me that there were no objections to the funding sources when she raised the issue at a meeting of the Conference of Chief Justices in summer 1995.

*Id.*

103. Dion Lefler & Robert Short, *Big Business Pays for Judges' Classes*, WICHITA EAGLE, Aug. 1, 1999, at 1.

Judge Gerald Elliott of Olathe, president-elect of the American Judges Association, said canons of judicial ethics prohibit judges from participating in any activities that could create an "appearance of impropriety."

Elliott said he doesn't think attending the [University of Kansas Economics Institutes for State Judges] is a violation of that canon because the program is sponsored by the university and has been approved by the Bar Association for credit in continuing legal education.

"You've got a program run by the University of Kansas," Elliott said. "State judges ought to be able to look at that with a fairly clear eye and think that it is a fair program."

But, he said, judges should be wary of the possibility of hearing cases involving companies that provide major funding.

"You might want to know who are the contributors to that," he said. "You might want to at least think about recusing yourself in a given case."

*Id.*

the three private educational institutions that sponsor ongoing judicial seminars. Many judges have attended more than one program.<sup>104</sup> To be sure, many judges have passed up the opportunity to participate in these programs, perhaps to avoid an appearance of impropriety. As noted, judges are entirely free to reach this conclusion as a matter of individual discretion.

Whether a judge, once having attended a private judicial seminar, is restricted in the ability to hear cases on which the seminars had some bearing, is a different matter. Recently, the Second Circuit became the first court to examine this question in depth. The decision, *In re Aguinda*,<sup>105</sup> arose from a civil lawsuit brought against Texaco by citizens of Ecuador and Peru. The plaintiffs claimed that Texaco's pollution had caused environmental damage and personal injuries in their countries. The district judge initially dismissed the lawsuit and, while the decision was on appeal, attended an expenses-paid seminar conducted by FREE on environmental issues.<sup>106</sup> Texaco was a contributor to FREE and a former Texaco executive officer spoke at the seminar.<sup>107</sup> After the court of appeals remanded the lawsuit back to the district court, the plaintiffs argued that the district judge should be disqualified from continuing to preside over the environmental litigation.<sup>108</sup> The judge concluded that he was not required to disqualify himself, and the court of appeals agreed.<sup>109</sup>

The Second Circuit addressed the plaintiffs' arguments at considerable length. First, examining Texaco's minor contribution to FREE's general funding,<sup>110</sup> the court concluded that a reasonable observer would regard the donation as "too remote to create a plausible suspicion of improper influence."<sup>111</sup> The court compared a judge's attendance at a FREE seminar to a judge's attendance at expenses-paid programs sponsored by bar associations and law schools. The court observed that no reasonable person would expect a judge who attended such programs to favor a party that was a minor donor to the law schools or bar associations serving as sponsors.<sup>112</sup>

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104. See Ethics of Judicial Education, *supra* note 1, at app. B, at 11.

105. *In re Aguinda*, 241 F.3d 194, 197 (2d Cir. 2000).

106. *Id.* at 197-98.

107. *Id.*

108. *Id.*

109. *Id.* at 198.

110. *Id.* at 202.

111. *In re Aguinda*, 241 F.3d at 202-03.

112. *Id.* at 203.

Additionally, the Second Circuit assumed for the sake of argument that the particular environmental seminar attended by the district judge made an unbalanced presentation on policy issues. As a general rule, the court held that the judge could nevertheless preside over environmental litigation.<sup>113</sup> The court reasoned that even if the seminar persuaded the judge that environmental laws are harmful, it would be presumed that the judge would put aside his personal beliefs and carry out the law.<sup>114</sup> Further, it noted that judges have many encounters with writings and talks pertinent to their cases, and inquiry into how those encounters influence their views would be impractical.<sup>115</sup>

The Second Circuit saw no meaningful difference between attending an expenses-paid seminar sponsored by FREE and attending any other presentation on a debated issue<sup>116</sup> sponsored by an organization that receives funding, even if minor or remote, from a party or its attorney.<sup>117</sup> Therefore, the court suggested, if attendance at the FREE seminar was thought to create an impermissible appearance of partiality, judges would have to stop attending similar seminars in order to avoid being disqualified from hearing future cases related to such seminar's subject matter.<sup>118</sup>

The Second Circuit identified particular circumstances, however, where attending an expenses-paid seminar might bar a judge from later participating in a case. The first is when a party or its lawyer contributes "a significant portion of [the sponsoring organization's] general funding."<sup>119</sup> Whether a contribution was "significant" must be determined on a case-by-case basis; the court's point was that the contribution raises concerns when a judge accepts "something of value from an organization whose existence is arguably dependent upon a party to litigation"<sup>120</sup> or its counsel.

Disqualification might also be required, the appellate court said, when the judge attended a presentation concerning legal issues material to a claim's disposition or defense in the particular lawsuit or involving parties, witnesses or counsel in particular actions.<sup>121</sup> The court was unable to say with precision when there was a close

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113. *Id.* at 203-04.

114. *Id.* at 204.

115. *Id.*

116. *Id.* at 205.

117. *In re Aguinda*, 241 F.3d at 205.

118. *Id.*

119. *Id.* at 206.

120. *Id.*

121. *Id.*

enough match between the legal issues discussed at an educational seminar and those in the lawsuit to require disqualification. The court did note, however, that when parties or their lawyers fund seminars that bear too closely on a litigation in which they are involved, "the appearance created bears too great a resemblance to an *ex parte* contact."<sup>122</sup>

The court concluded by taking a swipe at CRC, whose July 2000 report had provided the underpinnings of the plaintiffs' disqualification motion. The court noted that the plaintiffs sought to "benefit from CRC's rather ample access to the media,"<sup>123</sup> and observed that the question whether conduct gives rise to an appearance of impartiality must be judged "based on the facts of the presentation involved and not on the amount of publicity partisans on the particular issues can muster." From the perspective of Henry G. Manne, the self-described "Johnny Appleseed of the Law and Economics movement"<sup>124</sup> who had established LEC more than twenty-five years earlier, the Second Circuit's decision had "so thoroughly answered the specific objections" to the judicial seminars that the "whole topic" of judicial education "would seem to be controversial only to whatever new group of intellectual Luddites is threatened by ideas they find inhospitable."<sup>125</sup>

## II. THE JUDICIARY'S DETERMINATION ACCORDS WITH THE APPLICABLE RESTRICTIONS

Critics might be skeptical of judicial expressions of approval for judicial seminars for several reasons. It might be argued that the judiciary's approval is not sufficiently explicit or thought out; that it proceeds from the erroneous belief that the judicial seminars are more balanced than they are; that it is otherwise based on an incomplete or erroneous understanding of how the programs operate; or that judges have been led astray out of a self-interested desire to attend these programs. However, as discussed below, the judiciary's approval of privately funded education is consistent with existing regulatory provisions.

The applicable law (e.g., disqualification statutes, restrictions on government officials generally, and judicial ethics codes) may vary from jurisdiction to jurisdiction, as may the courts' and other au-

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122. *Id.*

123. *In re Aguinda*, 241 F.3d at 206.

124. Henry G. Manne, Remarks for ABA Panel on Continuing Education for Federal Judges 3 (Aug. 5, 2001) (on file with Fordham Urban Law Journal).

125. *Id.* at 1.

thorities' interpretations of that law. In some states, judges perhaps should not participate in law-and-economics programs that indirectly support judges' expenses with contributions from certain corporations or foundations. Rather than comprehensively surveying the law of every jurisdiction,<sup>126</sup> this Article focuses on federal law, the 1990 ABA Model Code of Judicial Conduct (which serves as a model for the federal judicial code as well as those of most states),<sup>127</sup> and certain state laws that serve as useful exemplars because they are interpreted by published judicial decisions and/or advisory opinions.

Under the generally prevailing law, two questions might be asked. First, even if their expenses are not paid or reimbursed, are judges forbidden from attending the law-and-economics programs because, for example, the programs are unbalanced or misleading and might affect the judges' later decision making? Second, even if judges' mere attendance would otherwise be permissible, are judges forbidden from attending at no expense, or, having attended, must they later recuse themselves in certain cases? As discussed below, the answer to both questions is reasonably clear. Under prevailing law, there is no flat prohibition from participating fully in expenses-paid educational programs—even those that reflect a particular perspective on certain legal questions—and there is no ordinary requirement that, if they do participate, judges must recuse themselves when a corporation affiliated with a contributor to these programs is a party to an action.

### A. Attendance

The judicial seminars offered by LEC, FREE, and LOEC are not recorded and disseminated or otherwise open to the public. There is therefore room for unresolvable disagreement about the precise nature of the instruction and whether it is balanced.<sup>128</sup> The organizers, as well as some judges who have been interviewed after

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126. See *supra* note 100 for a summary of states surveyed.

127. *Supra* note 49.

128. The organizers of these programs might well be criticized for not making the programs more "transparent"—for example, by recording them and making the record available to scholars and critics. Doing so might serve several salutary ends. It would permit those with different perspectives to publicly critique the programs and point out areas where, in their view, the programs are one-sided, misleading, or simply incorrect. Such critiques might enable judges to make a better informed decision whether to attend the programs, *cf.* Adv. Op. 67, *supra* note 74, and, if judges do attend, such critiques might serve as a counterweight to instruction that critics consider to be one-sided. On the other hand, there may be pedagogic considerations—for example, judges may be reluctant to participate in discussions as openly if their



attending, have denied that the instruction is misleading or unduly slanted. However, based on what is known of the organizers' views, the published curricula, the identity of the instructors, and accounts of the seminars, critics have charged that the instruction is unbalanced or biased. As noted earlier, this Article proceeds on the assumption that the critics are correct.<sup>129</sup>

This raises a concern about judges' attendance at the judicial seminars wholly independent of the financial arrangement (i.e., that judges attend for free and that their travel, lodging, and meals are subsidized). Even if judges were willing to pay their own way, one might argue they should not attend. The concern is that, by attending educational programs relating to the law, judges expose themselves to individuals with particular views of the law and subject themselves to possible influences that may later affect how they approach litigation. This concern might be raised, of course, even where an educational program makes every effort to be balanced, since an expression of all conceivable viewpoints may be impossible to achieve and since some presenters may be more persuasive than others for reasons (such as the quality of their presentation) that are unrelated to the quality of their ideas. But the possibility that judges' thinking will be influenced outside the courtroom is more worrisome where the educational program is slanted in favor of a particular legal philosophy. Thus, it might be argued, judges should confine their education to the courtroom, where the presentation of legal arguments is public and opposing sides have an equal opportunity to present their views. Or, in the very least, judges should confine their extrajudicial legal education to balanced presentations.

In response to this concern, various answers might be offered with respect to the judicial seminars supported by the LEC, FREE, and LOEC, or with respect to judicial education generally. It might be argued, for example, that judges are sophisticated students who are not easily susceptible to misleading influences,<sup>130</sup> that judges should be able to rely on the reputation and integrity of

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questions and comments are recorded—that might suggest that greater openness should be sought by other means.

129. See *supra* text accompanying notes 19-24.

130. See Weinstein, *How Many Judges Learn*, *supra* note 84, at 552. Judge Weinstein made this point in the context of law-and-economics seminars. One might respond, however, that judges are not particularly well versed in economics or the sciences, which is precisely why they need education in these areas. Therefore, particularly without assistance, judges will not be well qualified to distinguish between balanced instruction and slanted or misleading instruction in these subjects.

the educational institution offering the program to ensure that it is not excessively biased or misleading;<sup>131</sup> that judges should be able to rely on the judgment of previous attendees that the programs are educational and not unduly slanted;<sup>132</sup> that judges can obtain "balanced" instruction by attending several programs no one of which is "balanced;"<sup>133</sup> or that confining judges to "balanced" programs would essentially deny judges the opportunity to engage in extrajudicial education at all, because all programs are to some degree imbalanced, because, to be effective, a presentation must promote a particular perspective,<sup>134</sup> or because a judge can never know in advance whether and to what extent a program will be balanced.

However one comes out on this question as a matter of judicial policy, the law is clear that, as a general rule, judges are free to educate themselves outside the courtroom, and the limited restrictions that exist would not foreclose judges from attending judicial seminars in law and economics, even "biased" ones. This reflects a reasonable judgment that the value of ongoing judicial education far outweighs the risk that judges will be unduly influenced by biased or misleading instruction.

The relevant provisions reflect two general principles. The first is that judges may have views, including views on the law.<sup>135</sup>

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131. See *id.* at 548.

132. See, e.g., Barbash, *supra* note 7 at A3 ("[U.S. District Judge Samuel] Conti said that, 'If I thought I was being brainwashed, I'd say forget it. I go to a lot of other judges' meetings and don't go back because they're boring. Not this one.'"); Beckwith, *supra* note 7 (quoting Circuit Judge Harold Leventhal: "They are definitely free-market oriented . . . . But they're careful to give you access to several points of view. I get the impression they're trying to expose judges to the fact that there is a point of view on the other side, but they don't say the other side is necessarily correct . . . . In the instruction, it's implicit that the Chicago point of view is widely misunderstood . . . and that people should be aware of it. But I was aware when I came down here that this could be a steering operation. And if I'm being steered, I'm not aware of it."); *id.* (quoting Circuit Judge Malcolm Wilkey: "It hasn't been a snow job . . . . We judges often find that economic arguments are advanced by some counsel with a high degree of confidence. This knowledge will help us calculate the real probability of those arguments being true."); see also Henry N. Butler, *Judges' Economics Classes Not Improper*, WICHITA EAGLE, Aug. 12, 1999, at A6 ("[W]hat we teach is positive economics, and it can only help in making better decisions within any ideology"); *id.* ("Those who claim that teaching economics is biased or partisan don't understand economics enough to be taken seriously.").

133. See *Oversight Hearing*, *supra* note 95, at 37 (remarks of Rep. Frank).

134. *Id.* at 36 (remarks of Rep. Frank).

135. Hon. Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 638 (1996).

It is one thing to ask that judges be detached in the sense that they must place their allegiance to the rule of law and the judicial institution above

Judges are not blank slates. Thus, judges may possess, and develop over time, general opinions about legal and policy questions and are free to decide cases on which those opinions may have some bearing.<sup>136</sup> Indeed, when deciding cases, judges are expected to draw on their views of the law.<sup>137</sup> As Chief Justice Rehnquist explained in a speech to the Association of the Bar of the City of New York:

[One dictionary definition of "bias"] is "an inclination of temperament or outlook." In that broad definition of "bias," one can scarcely escape the conclusion that all judges, to a greater or lesser extent, are biased. . . . The late Justice Black was, in this sense of the word, "biased" in favor of a literal construction of the First Amendment to the United States Constitution, and made no bones about saying so. But it cannot be this sort of "bias" which would disqualify a judge, else it would be the rare case in which a quorum of a court could be mustered for decision.

I would suggest that the true distinction is between the concept of attitude or outlook, which is not disqualifying, and the concept of "favoritism," which is disqualifying. Favoritism to me means a tendency or inclination to treat a particular litigant more or less generously than a different litigant raising the identical issue.<sup>138</sup>

To like effect, a commentator has reasoned that

Disqualifying a judge because of his general legal philosophy or point of view is clearly impractical and nonsensical. All judges have acquired predispositions and philosophies that affect their behavior, on and off the bench. Such predispositions should not

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their personal considerations or predilections. However, if by calling the ideal judge "detached" we mean that such a judge is both disengaged and disinterested, without interests or points of view, without preferences or biases, we are not only speaking of a different sort of detachment, but we are also erecting an ideal which is clearly unattainable.

*Id.*

136. See, e.g., *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979); Litteneker, *supra* note 38, at 252 ("[A] consistent and predictable judicial philosophy demands that a judge have certain preconceptions on matters of legal principle, even though they may disadvantage a party.").

137. According to Chief Judge Judith S. Kaye of the New York Court of Appeals: "[T]he danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving cases before them. It seems to me that a far greater danger exists if they do not." Hon. Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1015 (1988).

138. Hon. William H. Rehnquist, *Stuff and Nonsense About Judicial Ethics*, 28 REC. ASS'N BAR CITY N.Y. 694, 709 (1973).

be ground for disqualification. As one commentator stated: "[I]nsofar as a judge has developed a consistent philosophy, he might be said to have prejudged the legal issues involved in a particular case. Arguably, under these circumstances his impartiality reasonably could be questioned . . . [but disqualification for this reason] would preclude consistent judicial and rational functioning by the judiciary."

That judges have developed legal philosophies and opinions is accepted and inherent in the judicial system. Indeed, those nominated to become federal judges often are chosen precisely because they are believed to have certain legal philosophies and outlooks. Once a judge is in office, it is expected, and in fact desired, that he will develop an individual outlook and point of view, a general judicial philosophy.<sup>139</sup>

When the Code of Judicial Conduct was revised in the early 1970s, the drafters "recognized the necessity and value of judges having fixed beliefs about constitutional principles and many other facets of the law."<sup>140</sup> When it adopted a provision requiring judges to disqualify themselves for personal bias or prejudice,<sup>141</sup> the committee specifically intended to exclude situations in which the judge had "a fixed belief about the law applicable to a case."<sup>142</sup> This Code provision is the model on which the current federal disqualification statute and many state statutes are based.

The second general principle is that judges may, and should, engage in extrajudicial activities relating to the law, including educational activities,<sup>143</sup> although such involvement may influence their understandings of the law. When the Code of Judicial Conduct was amended in 1972, one commentator made the following observation:

On the whole [the Code] does not assume or try to prescribe a cloistered judicial role; indeed, to the extent that it encourages a judge to engage in a variety of activities and not recede into monastic contemplation it recognizes that the business of judg-

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139. Bloom, *supra* note 38, at 683 (quoting Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 757 (1973)).

140. E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 61 (1973).

141. The current provision is Canon 3E(1)(a) of the MODEL CODE OF JUDICIAL CONDUCT (1990).

142. Bloom, *supra* note 38, at 691.

143. See, e.g., Abrahamson, *supra* note 135, at 646-47; John E. Cribbet, *The Public Activities of a Judge*, 51 CHI. B. REC. 78, 81 (1969) ("Judges should not be removed from the mainstream of life . . . Obviously, [a judge] should be allowed, if not actually encouraged, to participate in the activities of the organized bench and bar and of legal education.").

ing is more than the mere application of precedents and requires more than merely being "learned" in the law. . . .

To strictly prohibit judges from all extra-judicial activity, as many have suggested, would be counterproductive; the small possible net gain in diminished conflicts of interest would be outweighed by the resulting losses in judicial vision and independence of thought. Judicial independence is a value worth supporting if it implies and creates the conditions under which judges can offer a fresh, enriched, and informed view of solutions to society's problems. It is not worth supporting if it means only that judges are to be artificially and excessively isolated. As Judge Irving Kaufman has noted, "the increasingly complex and sensitive issues our society leaves to be settled by litigation" leave little room for encouragement of judicial myopia. The biases of ignorance and parochialism seem to me, on the whole, more difficult to combat than economic partiality.<sup>144</sup>

Similarly, Robert B. McKay, then dean of New York University School of Law, described the importance of non-judicial activities as follows:

It would be easy, but intellectually lazy, to hold that the sole business of judges is judging, that all else is at least distracting, and that accordingly a judge should avoid all nonjudicial activities that might either be time-consuming or influence his opinion on matters that come before him. The argument proves too much. If a judge is to live in *this* world and not in the isolation of a sequestered juror, he is constantly shaping his views on all kinds of matters that may come before him. The perceptions of a judge are influenced by conversations with family, friends, and colleagues; by his choices among the competing news media; his

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144. Joel B. Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803, 808-09 (1972) (quoting Hon. Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROB. 3, 7 (1970)). Professor Grossman went on to propose that the Code contain a provision that would affirmatively encourage judges to educate themselves broadly:

I would add: "Consistent with the above a judge should seek, as widely as time and resources permit and from any source, to obtain facts and opinions which may enhance his ability to decide a case justly." This does not imply that a judge should seek third-party accounts of the facts of a particular case. It does seek to encourage judges to decide or conduct cases with the broadest possible background of general information. There are many judges, on high courts and lower courts, who have amply demonstrated this commitment to horizon broadening . . . . Hopefully [this admonition] would inspire some additional increment of judges to escape from the narrow intellectual confines of their chambers.

*Id.* at 815.

preferences in recreational activities; and even his tastes in clothes and hair styles (the long and short of it).

Skeptics may well charge overkill at this point, for of course no one suggests that judges cut themselves off from family, friends, and colleagues. But anything short of that impossible dream is unlikely to accomplish the objectives of those who seek immunization of the judiciary from all the opinion-shaping forces that surround them. It is at least arguable—and I for one would so argue—that a judge is likely to be a better dispenser of justice if he is aware of the currents and passions of the time, the developments of technology, and the sweep of events. To judge in the real world a judge must live, breathe, think, and partake of opinions in the real world.<sup>145</sup>

The Code of Judicial Conduct embodies this general principle as well.<sup>146</sup> It discourages judges from being cloistered:<sup>147</sup> “A judge may speak, write, lecture, teach and participate in other extra-judi-

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145. Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 25 LAW & CONTEMP. PROB. 9, 12 (1970).

Nonjudicial activities, whether quasi-judicial or extra-judicial in nature, should not be allowed if there is a substantial likelihood that the undertaking will

1. interfere with the performance of official duty;
2. interfere, or seem to interfere, with the impartiality of the participating judge; or
3. impair the dignity and prestige of the judicial office.

Where these hazards are not involved, there are reasons to permit, even to encourage, nonjudicial activities if their performance will

1. help to prevent judicial shortsightedness arising from loss of contact with the world outside the court;
2. continue the education and development of essential skills in law and judicial administration; or
3. enrich and educate the audiences to which the judge lecture, writes or teaches.

*Id.* at 19-20; Charles D. Breitell, *Ethical Problems in the Performance of the Judicial Function*, in JUDICIAL ETHICS 64, 80 (1964) (“If law were simple, if judges merely applied law like so many black-letter principles and rules, and if the determination of facts was a simple process, . . . then perhaps, the judge isolated from all controversial aspects of community life would be the ideal. The ivory tower would be the true symbol. But law is not simple. The determination of facts is not simple. A judge without contact, continuing substantial contact, with the community in which he is a judge is not a good modern judge.”); Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 989 (1984-85) (“Not only is it impossible to isolate a judge from opinion-shaping forces, it is undesirable to give the impression that this has been accomplished . . . . Similarly, judges’ knowledge of the public is essential to the dispensation of justice . . . . [T]he impulse to protect judges from adverse influences by cutting them off from the life of the community is not only ‘intellectually lazy,’ but is also self-defeating.”)

146. See McKay, *supra* note 145, at 20-21. These views were shared by then Circuit Judge Irving R. Kaufman, a member of the Special Committee on Judicial Conduct that drafted the 1972 code:

cial activities concerning the law, the legal system, the administration of justice and non-legal subjects."<sup>148</sup> Advisory opinions

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Once on the bench, we are accustomed to expect from our judges a breadth of vision that comports with their independent status; and I think it not merely happenstance that it has been men with diverse interests and backgrounds that have, as a general proposition, met that test. Edmund Burke is supposed to have said, "Law sharpens the mind by narrowing it." It seems to me that the words were meant less in praise of the profession than in warning to it. Judges run the risk of becoming oracles who speak of lectures delivered ten, twenty, or thirty years ago, adequate for their time but not for ours. To the extent that the judicial profession becomes the daily routine of deciding cases on the most secure precedents and the narrowest grounds available, the judicial mind atrophies, and its perspective shrinks . . . .

Hence I think that much can be said in favor of the position that we ought to encourage, rather than discourage, judicial activities that exceed the four corners of cases presented for disposition. There can be few qualities more conducive to continue judicial independence than the breadth of vision acquired in differing endeavors to advance law and justice.

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One can take the position that since judicial tasks might be slighted, quasi-judicial and extra-judicial activities should be abandoned altogether, especially since drafting a specific rule permitting some quasi-judicial activities seems virtually impossible. Yet this would, I submit, be the worst of all possible worlds, for it would place a premium on judicial myopia in an age that incessantly demands more independence and more understanding to solve the increasingly complex and sensitive issues our society leaves to be settled by litigation.

Kaufman, *supra* note 61, at 4-5, 7.

147. See, e.g., Ark. Jud. Advisory Op. 97-02 (Apr. 25, 1997) ("Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.") (quoting ARKANSAS CODE OF JUDICIAL CONDUCT Canon 4 cmt.).

148. MODEL CODE OF JUDICIAL CONDUCT Canon 4(B) (1990). A knowledgeable observer has commented:

The line between appropriate quasi-judicial activities and those that are likely to lead to a judge's disqualification is not as difficult to draw as may first appear. For example, a judge may write or lecture on a legal issue, analyzing the present law and its history, its virtues and its shortcomings; he may commend the present law or propose legal reform without compromising his capacity to decide impartially the very issue on which he has spoken or written. There is a significant difference between the statement, "I will grant all divorce actions that come before me—whatever the strength of the evidence to support the statutory ground for divorce—because I believe that persons who no longer live in harmony should be divorced," and the statement, "I believe that limited statutory grounds for divorce are not in the public interest. The law should be changed to allow persons who no longer live in harmony to obtain a divorce." The latter does not compromise a judge's capacity to apply impartially the law as written, although it clearly states his position about improvements in the law.

The Committee recognized the need for judges to participate actively in improving the law, the legal system, and the administration of justice. This Canon was designed to encourage those activities but also to provide a standard that protects the judge's essential function.

confirm that judges may engage in activities, such as writing,<sup>149</sup> teaching or lecturing,<sup>150</sup> or participating in organizations to improve the law,<sup>151</sup> notwithstanding that the judge's knowledge, phi-

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THODE, *supra* note 140, at 74.

149. *See, e.g.*, Fla. Judicial Ethics Comm., Advisory Op. 99-14 (May 4, 1999) (advising that a judge may write a monthly newspaper column on the judicial system); Fla. Judicial Ethics Comm., Advisory Op. 93-52 (Sept. 7, 1993) (advising that a judge and criminal defense lawyer may co-author a chapter for the state bar's continuing legal education course); Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 92-18 (Oct. 16, 1992) (advising that a judge may receive compensation for preparation of juvenile law handbook); Supreme Court of Ohio, Board of Comm'rs on Grievances and Discipline, Op. 91-10 (Apr. 12, 1991) (advising that a judge may receive compensation for preparation of educational materials for lawyers and non-lawyers).

150. *See, e.g.*, Fla. Judicial Ethics Comm., Advisory Op. 98-14 (July 13, 1998) ("A judge may speak, write, lecture, or teach the electorate at public forums about issues concerning proposed constitutional amendments if they involve the law, the legal system, and the administration of justice"); Ill. Judicial Ethics Comm., Op. 94-17 (June 17, 1994) (opining that judges may create a speakers' bureau and inform the public of the judges' availability to speak on law-related issues); Ind. Judicial Nominating Comm., Ind. Comm. on Judicial Qualifications, Advisory Op. 1-91 ("Judges, of course, may speak, write, and lecture about the law, the legal system, and the administration of justice . . . In fact, judges are encouraged to contribute to the profession in this manner. Furthermore, it is perfectly proper for a judge to profit financially from this activity"); Supreme Court of Kan., Judicial Ethics Advisory Panel, Op. JE-74 (Apr. 14, 1997) (opining that a judge may serve as a lecturer or panelist in a law firm continuing legal education seminar on legal ethics); State Bar of Mich., Comm. on Prof'l and Judicial Ethics, Op. JI-99 (Mar. 15, 1995) (opining that a judge may teach a law course at a private college or university); N.Y. Judicial Ethics Op. 94-40 (Apr. 28, 1994) (opining that a full-time judge may accept a paid teaching position as an adjunct professor of law at a school of law within the geographical boundaries of the judge's court); Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 95-9 (Aug. 4, 1995) (opining that a judge may receive compensation for teaching continuing legal education classes or courses); *see also* THODE, *supra* note 140, at 75 (reporting survey results that showed "that more than one-half of the law schools whose deans answered the questionnaire (45 out of 76) regularly use one or more full-time judges as part-time law teachers or lecturers, that at least 87 appellate judges and 126 trial judges regularly teach or lecture in law schools, and that the deans of the employing schools believe that the judges contribute significantly to legal education.").

151. *See, e.g.*, Fla. Judicial Ethics Comm., Advisory Op. 98-26 (Nov. 10, 1998) (opining that a judge may serve on a mayoral commission whose mission is to help crime victims by "providing a forum for the community to develop and implement programs in education, prevention and intervention"); Fla. Judicial Ethics Comm., Advisory Op. 98-13 (July 7, 1998) (advising that a judge may communicate with members of the legislature on matters concerning the law, the legal system, and the administration of justice, including by speaking and submitting proposed legislation); Supreme Judicial Court [of Mass.], Comm. on Judicial Ethics, Op. 95-1 (Jan. 10, 1995) (opining that a judge may serve on the Board of Directors of the Crime and Justice Foundation, a non-profit foundation that supports programs in juvenile justice, court mediation, and truth in sentencing; however, recusal may be required if, for example, a case before the judge challenged the validity of legislation that the organization played a key role in enacting); State Bar of Mich., Comm. on Professional and Judicial



losophy or general judicial propensities may change as a result. Examples of judges' involvement in such activities are too numerous to mention. Needless to say, judges not only may teach, they may learn; they may not only espouse their views of the law, they may expose themselves to others' views.<sup>152</sup>

Circumstances where judges must refrain from attending educational programs or, having done so, must disqualify themselves from presiding in a case, are extremely rare. For example, although judges may hold a general opinion about a legal or social matter relevant to a case,<sup>153</sup> a judge may not preside if the judge has acquired from extrajudicial sources "prior personal knowledge

Ethics, Op. JI-67 (Mar. 30, 1993) (opining that a judge may sit as member of independent law revision commission).

152. See, e.g., N.Y. Judicial Ethics Op. 91-75 (June 13, 1991) ("Traditionally, bar associations and similar organizations have conducted seminars, forums and programs to enhance legal professionalism and for which fees are charged. Judges likewise participate as lecturers and program advisors. This is consistent with judges' and attorneys' responsibility to be faithful to the law and maintain professional competence in it.").

153. Jeffrey M. Shaman, *Bias on the Bench: Judicial Conflict of Interest*, 3 GEO. J. LEGAL ETHICS 245, 245, 250-51 (1989) [hereinafter Shaman, *Bias on the Bench*].

Judges, after all, must live in the real world, and cannot be expected to sever all of their ties with it upon taking the bench. Nor would it be entirely beneficial to the judicial process for judges to isolate themselves from the rest of society. Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions.

[B]ias or prejudice do not refer to the attitude that a judge may hold about the subject matter of a lawsuit. That a judge has a general opinion about a legal or social matter, or influenced policy that relates to the case before him or her, does not disqualify the judge from presiding over the case. Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be magically shed when they take the bench. The fact that a judge may have publicly expressed views about a particular matter prior to its arising in court should not automatically amount to the sort of bias or prejudice that requires recusal.

*Id.* See also Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 2-3 (1988).

[J]udges are not blank slates, especially in regard to the law. It is a fantasy to expect that judges will have no prior opinion about the vast majority of legal issues that come before them. Indeed, after years of studying, practicing, and caring about the law, any person who did not entertain opinions about it probably wouldn't make a very good judge. The fact is that judges do—and should—have opinions about civil rights, torts, contracts, wills and trusts, and most other areas of the law. While judges should be open-minded to some degree about legal issues, open-mindedness is not the equivalent of impartiality, and it is unrealistic to think that judges are impartial about legal matters.

*Id.*

of evidentiary facts regarding a proceeding.”<sup>154</sup> Thus, while judges may learn about the law, or other disciplines—including economics or science—and may also learn about current events, learning specific facts relevant to a litigation may require the judge later to be disqualified in that litigation. Additionally, generally speaking, a judge should not become affiliated or closely identified with an organization that is, or probably will be, engaged in litigation before the judge or the judge’s court.<sup>155</sup> Doing so will cast doubt on the judge’s capacity to act impartially where the organization is a

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154. Shaman, *Bias on the Bench*, *supra* note 153, at 259-60; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (1990) (a judge shall disqualify himself or herself when “the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding”).

155. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4(C)(3)(a) (1990); *see, e.g.*, Fla. Judicial Ethics Comm., Advisory Op. 98-8 (May 28, 1998) (advising that a judge may not belong to victim’s rights organization which seeks to sponsor unofficial training for judges, review judicial rulings and sentences, and support bills and legislation, because membership in such an organization would cast a reasonable doubt on the judge’s capacity to act impartially); Ga. Judicial Qualifications Comm’n, Op. 98 (June 12, 1987) (opining that a judge may not become dues paying member of plaintiffs’ or defendants’ Trial Lawyers Association); Ill. Judicial Ethics Comm., Op. 94-7 (Mar. 22, 1994) (opining that a judge may not endorse association’s support of laws addressing such issues as sexual harassment, violence against women, and reproductive choice); Supreme Court of Kan., Judicial Ethics Advisory Panel, Op. JE-70 (Sept. 16, 1996) (opining that a district judge may not serve on a police department community advisory board whose purpose is to advocate community policing and improve police services, because “[m]embership on the board would give the impression that judges, as members, were closely associated with the police department and the prosecutorial function, and thus would cast reasonable doubt on the judges’ ability to act impartially”); Supreme Court [of Mass.], Comm. on Judicial Ethics, Op. 98-13 (Aug. 27, 1998) (opining that a judge may not serve on city’s Community Policing Commission, because participation would convey the impression that police were in a position to influence judge); Okla. Advisory Panel, Op. 98-1 (Mar. 26, 1998) (opining that a judge may not become a member of a Task Force on Domestic Violence, because “it is an organization that will frequently be engaged in proceedings that would ordinarily come before the Judge or will be frequently in adversary proceedings in the Court of which the Judge is a member”). *See generally* THODE, *supra* note 140 at 76; Steven Lubet, *Judicial Ethics and Private Lives*, 79 Nw. U. L. REV. 983, 984 & n.11 (citing additional examples).

[Canon] 4C specifically authorizes [the judge’s participation in bar association activities and law reform or improvement organizations] as another means of keeping the judge in contact with the world around him and as a way of making his expertise available in the ever-continuing effort to improve the law. The judge must not, however, become involved in a way that casts doubt on his impartiality. The “impartiality” standard would, for example, prevent a judge from participating as a member or officer of a partisan legal organization that champions one special interest in litigation that may be heard in the court on which he sits. Such a relationship would almost certainly cast doubt on a judge’s capacity to decide impartially the issues in that type of litigation.

THODE, *supra* note 140, at 76.

party.<sup>156</sup> Likewise, it has been deemed improper for a judge to attend a "training program" that is designed to accomplish a particular litigation objective.<sup>157</sup> Additionally, a judge is forbidden from

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156. There is no bright line between organizations concerned with the law and legal institutions, which judges are encouraged to participate in as members or officers, and those advocacy organizations which judges are forbidden from joining because of concerns about appearance of partiality. See Cal. Judges Ass'n, Comm. on Judicial Ethics, Op. 46 (July 1997).

It is impossible to draw a bright line between permissible and impermissible participation. However, whenever a group engages in advocacy with respect to substantive legal issues, participation by judges should be scrutinized with great care. If the group engages in such advocacy as to make judicial participation improper, it is not permissible to separate the judge from the advocacy functions of the organization and limit his or her involvement to the non-advocacy functions of the organization since the public will nevertheless perceive the judge as fostering the advocacy functions of the organization.

Factors to be considered in determining whether judicial participation is appropriate include: (1) the extent to which the group engages in political or advocacy activities; (2) the extent to which the group is perceived by the public as engaging in political or advocacy activities; (3) the size and public prominence of the organization; (4) whether the issues which concern the group are likely to come before the court; (5) whether the group is concerned with procedural or substantive changes in the law or the application of the law; (6) whether the judge is participating in a policy making position; (7) the fundraising activities of the group.

No single one or combination of these factors is determinative. The ultimate test for judicial participation in such bodies is whether the judge's association with the group, and the necessarily resulting public perception that the judge supports the group, is likely to lead to a public perception that the judge's impartiality in administering the law may be questioned.

To the extent that such groups are devoted to the improvement of the law, the legal system or the administration of justice, judicial participation is permitted. In fact, judges are encouraged by the canons to engage in activities which help to improve the administration of justice and the legal system. [Canon 4A, 4B] However, problems arise when the group engages in advocacy towards the adoption, repeal or modification of particular substantive laws or towards the courts' use and application of existing laws in a particular manner. Judicial participation in groups engaging in such advocacy creates a danger that the judge's ability to act impartially may be cast in doubt . . . .

*Id.*

157. In N.Y. Advisory Comm. On Judicial Ethics, Op. 94-31 (Mar. 10, 1994), the advisory committee opined that part-time local court justices may not properly accept an invitation to attend "a 'specialized training' program designed for prosecutors and magistrates" that would include instruction on substance detection procedures where the program was offered jointly by the state Division of Criminal Justice Services and the Bureau For Municipal Police for the avowed "purpose of . . . 'provid[ing] the information essential for effective prosecution of the drunk/drugged driver and the judicial details related to conducting such a trial.'" The committee reasoned that the justices' attendance would create the appearance of impropriety:

The training program's purpose and agenda are clearly planned to enhance the conviction rate of people accused of alcohol and drug-related vehicle and traffic crimes. While that is or may be a laudable, overall societal goal, it is

participating in partisan political activities, even including (in some jurisdictions) educational activities of a partisan political organization (i.e., a political party).<sup>158</sup> These limitations would not, however, generally restrict a judge from attending a program relating to the law, simply because the program may be biased or one-sided.<sup>159</sup>

Similarly, in an opinion written by the Committee on Judicial Ethics of the California Judges Association, the Committee observed that judges are encouraged to participate in the activities, including the educational activities, of organizations like state and local bar associations and specialty bar associations, such as busi-

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not one which the Judiciary shares as part of its constitutional mandate. The Judiciary exists to assure fairness and impartiality to all those accused of crime, and to protect their legal rights. To participate in the proposed educational enterprise would at least appear to place that mission at risk.

Judges, of course, should be encouraged to attend seminars, but only ones whose agendas are not born of strictly partisan concerns.

*Id.*; see also Supreme Court [of Mass.], Comm. on Judicial Ethics, Op. 98-9 (July 28, 1998) (opining that a judge may not participate in meetings of the Safe Neighborhood Initiative, an organization comprised of police and prosecutors that essentially performs a law enforcement function (e.g., targeting areas for increased police surveillance or setting priorities about what crimes to target) because the judge would be exposed to prosecutorial concerns without equal exposure to the countervailing concerns of the defense bar about the possible inaccuracy of facts presented at the meetings or the possible unfairness of overzealous prosecution); Supreme Court [of Mass.], Comm. on Judicial Ethics, Op. 97-8 (Sept. 6, 1997) (opining that a judge may not participate in tour of city organized by an organization representing government agencies "with an agenda that takes a strong position on one side of issues that come before the court," where "[t]he purpose of the tour is to show members of the court areas of the city affected by activities of defendants who appear before them").

158. See, e.g., Fla. Judicial Ethics Comm., Advisory Op. 98-14 (July 13, 1998) ("Once again we assert the general principle that [ ] judges are ethically precluded from appearing before partisan groups, even for educational purposes") (citing prior opinions); cf. Fla. Judicial Ethics Advisory Op. 98-10 (June 24, 1998) (stating that as long as a judge does not participate in fund raising, he or she may participate in organizational events other than those of partisan political organizations); N.Y. Judicial Ethics Op. 94-69 (June 16, 1994) (noting that a full-time judge may participate in a community volunteer project organized by a local assemblyman, "provided that the activity is not of a partisan political nature"; proposed activities, including "visiting residents of an old-age home, preparing and serving meals to the needy, assisting in health screening tests . . . appear not to contravene that standard.").

159. For example, Fla. Judicial Ethics Comm., Advisory Op. 98-05 (Apr. 10, 1998) holds that "a judge's mere presence at an educational program designed for and attended by criminal defense attorneys should be permitted, since it may improve the administration of justice by providing the judge with current important topics in the area of criminal law." The committee distinguished this situation from the one addressed in New York Judicial Ethics Advisory Opinion 94-31 (discussed in note 157, *supra*) "because the purpose of that program was to 'maximize enforcement,' whereas the only consideration at hand is an educational program dealing with current topics in criminal law."

ness trial lawyer associations, family lawyer groups, and similar organizations.<sup>160</sup> Further, although a judge should not become associated with viewpoints advocated by lawyer organizations that promote the interests of a limited segment of the bar (such as district attorney associations, public defender organizations, and plaintiff or defense-oriented bar associations), "it would be appropriate . . . for judges to participate as speakers or to participate in other capacities in educational programs sponsored by such groups."<sup>161</sup> In this respect, Opinion 67 reflects the prevailing understanding. Judges engage in a variety of intellectual activities outside the courtroom—including writing, teaching, and self-education—that likely influence their general approach to deciding cases but do not give rise to a disqualifying personal bias.<sup>162</sup> This issue was discussed at length in a slightly different context by the late Judge Leon Higginbotham while denying a disqualification motion in a discrimination class action.<sup>163</sup> The motion was based on an allegation that the judge possessed a personal bias in part attributable to his role as a scholar of race relations. Judge Higginbotham concluded that his work as a scholar, including his participation in an annual meeting of the Association for the Study of Afro-American Life and History, was entirely consistent with "the variety of extra-judicial activities which has been the accepted standard for judges in this District, in this circuit, and in the nation."<sup>164</sup>

Of the few cases where it was held to be improper for a judge to attend an educational program, the most frequently discussed is *In re Bonin*.<sup>165</sup> In that case, a Massachusetts Superior Court chief judge was suspended and censured for attending a public lecture by author Gore Vidal held as a fundraiser for defendants in criminal cases pending in the superior court. The Massachusetts Supreme Court concluded that by attending the meeting, the chief judge exposed himself to ex parte statements and argumentation on matters before his court and compromised his position by seeming to sympathize with the views of the group sponsoring the event."<sup>166</sup>

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160. Cal. Judges Ass'n, Comm. on Judicial Ethics, Op. 47 (Sept. 11, 1997).

161. *Id.*

162. See, e.g., *Liteky v. United States*, 510 U.S. 540, 554 (1994) ("The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a . . . sufficient condition for 'bias and prejudice' recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice.").

163. *Penn. v. Local Union 542*, 388 F. Supp. 155 (E.D. Pa. 1974).

164. *Id.* at 181.

165. *In re Bonin*, 378 N.E.2d 669 (Mass. 1978).

166. *Id.* at 683.

The *Bonin* decision has been harshly criticized,<sup>167</sup> but even giving it full weight, it would not generally foreclose judges from attending privately-funded judicial seminars. In *Bonin*, by attending a lecture, the judge exposed himself to discussions of specific criminal cases pending in the judge's court that would potentially come before the judge himself. Further, because the organizers' purpose in presenting the lecture was to raise funds for the defense of the defendants in those cases, the judge's purchase of a ticket and attendance might have appeared to be an expression of public support for those parties in the litigation. Judicial seminars on subjects such as law and economics are quite different. Although they in-

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167. The opinion has been criticized by Northwestern University Law Professor Steven Lubet (co-author of a leading treatise on judicial ethics):

It is true that a judge must refrain from commentary on pending litigation, but here the Massachusetts court extended caution beyond the point of reasonable application. Judge Bonin did not comment on pending litigation beyond the fact of his attendance at a large meeting. The term "comment" is defined as a writing, a remark, a statement of opinion, or a talk, and Judge Bonin did none of these. While it is true that his attendance at the meeting might cause some to infer that he supported the cause, it is at least equally likely that it would be interpreted as being motivated by curiosity or interest in the remarks of the well-known featured speaker. If Judge Bonin had been assigned to hear the trial or trials in question, a stronger inference of impropriety would be possible, but here the judge had no substantive involvement in the cases, and, indeed, he subsequently removed himself from any participation in the case. Finally, it is irrelevant that Judge Bonin exposed himself to "one-sided argumentation." Since Judge Bonin was to make no ruling in the case, there could be no possible adverse effect from his infection by the statements made at the meeting. The very notion that judges, as opposed to jurors, can be contaminated by public discourse is questionable. . . . In short, Judge Bonin should have been free to attend the public lecture, so long as he limited himself to the role of spectator and refrained from making actual public statements concerning the matters at issue.

Lubet, *supra* note 145, at 1006-07.

In his article on how judges learn, Judge Weinstein similarly criticized the *Bonin* decision:

In general, a judge ought to be able to attend any lecture of public meeting . . . . Pending cases require special sensitivity lest the judge give the impression that his or her views will have some influence in the case. Yet, on the facts, the judge was apparently unaware that the meeting was connected with a pending case. If that were so, pressure to resign and his resignation were not appropriate. A firm statement by him after the event that he attended to learn and hear the views of an eminent writer, not to support a view or side in a legal dispute should have sufficed. Judges should not allow themselves to be denied elementary civil rights.

Even in a large sophisticated town like New York, a judge might hesitate to attend such a lecture. But it would be abhorrent to censure a judge for doing so. The Boston decision seems like a bad precedent. Such decisions should be opposed by the bar and the public press.

Weinstein, *How Many Judges Learn*, *supra* note 84, at 553-54.

volve discussions of the law, there is no indication that they include discussions of the facts of particular cases that are pending or that may later come before the judges who attend.<sup>168</sup> Nor do these seminars resemble public fund raising events, such that judges, by their public attendance, appear to be endorsing the organizers' cause.<sup>169</sup>

Questions might be raised, however, if an educational institution that sponsors judicial seminars requested judges to send letters to their contributors. Arguably, the judges' letters of support would be permissible under Model Code of Judicial Conduct Canon 4(C)(3)(b)(ii) (1990), which provides that a "judge . . . may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice[.]" But such letters might also be

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168. Obviously, one implication of *Bonin* is that the educational institutions sponsoring judicial seminars should take steps to insure that discussions of pending or future cases do not occur.

169. The *Bonin* case does suggest, however, that judges should not affirmatively support the fund raising efforts of partisan organizations. This is consistent with the Code of Judicial Conduct, which expressly prohibits judges from using their office for fundraising purposes. See MODEL CODE OF JUDICIAL CONDUCT Canon 4(C)(3)(b)(iv) (1990) ("A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise . . . shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation."). See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1211 (Feb. 9, 1972) (explaining that although a judge may serve as officer of a bar association and, in that capacity, allow his or her name to be included on the association's letterhead, the judge may not sign a letter soliciting new members, because doing so would infer that the judge is utilizing the prestige of the judge's office to persuade lawyers who might appear before the judge to join the Association); Fla. Judicial Ethics Comm., Advisory Op. 98-6 (May 28, 1998) (stating that a judge may serve as director of a task force that addresses issues involving the mentally ill in the criminal justice system, but may not participate in fund raising activities for a non-profit corporation seeking private funding for mental health facility connected to the mental health court); Fla. Judicial Ethics Comm., Advisory Op. 90-20 (Aug. 22, 1990) (stating that a judge's presence and participation as guest of honor at event would be prohibited if it enhances an associated fund raising activity); Ill. Judicial Ethics Comm., Op. 96-3 (Mar. 6, 1996) (stating that a judge may not be speaker or introduce honoree at university scholarship fund raising event, and may not sit at head table at charitable fund raising event if he is a "speaker" or "the guest of honor"); N.Y. Judicial Ethics Op. 90-135 (Sept. 18, 1990) (explaining that a full-time judge may not serve as study group leader in foreign legal study program sponsored by a private foundation where the judge's level of reimbursement would depend on the number of participants and the organization would use the judge's name and title to solicit participants, because this would constitute an impermissible use of the prestige of the judge's office for the organization's financial advantage and might appear to involve the exploitation of judicial office for the judge's private gain); N.Y. Judicial Ethics Op. 90-129 (Sept. 18, 1990) (noting that a full-time judge may serve as a member of the judicial honorary board of the NAACP provided that the judge does not participate in the solicitation of funds).

criticized for putting the prestige of the judge's office behind the organization's efforts to raise funds.<sup>170</sup>

Further, if an organization presenting the judicial seminars sought to accomplish a particular litigation objective, judges might be restricted from allying themselves with the organization. Although judges may become involved in organizations that seek to reform the law,<sup>171</sup> they have been foreclosed from becoming members or officers of certain organizations that engage in advocacy activities, out of concern that the judge's impartiality might be questioned.<sup>172</sup> For example, Professor Steven Lubet has noted that "Judges have been counseled to avoid membership in such uncontroversial undertakings as an 'antishoplifting' organization and Mothers Against Drunk Driving, lest they cast doubt on their ability to preside fairly over theft and drunk driving prosecutions."<sup>173</sup> In the case of such advocacy groups, other expressions of support short of membership may also be proscribed.<sup>174</sup>

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170. See La. Supreme Court Comm. On Judicial Ethics, Letter Op. (Aug. 20, 1996) (stating that it is ethically impermissible for chief justice to write and sign a letter of support for the work of the National Center for State Courts, to be included in mail fund-raising solicitations to attorneys and law firms, because doing so lends the prestige of the judicial office to the organization's fund-raising activities).

171. See MODEL CODE OF JUDICIAL CONDUCT Canon 4(B) (1990); see, e.g., Fla. Judicial Ethics Comm., Advisory Op. 98-31 (Nov. 30, 1998) (stating that a judge may be a member of a voluntary bar association that supports a proposed constitutional amendment); Fla. Judicial Ethics Comm., Advisory Op. 98-9 (June 24, 1998) (stating that a judge may participate in a county community justice coalition); Fla. Judicial Ethics Comm., Advisory Op. 96-9 (May 29, 1996) (stating that a judge may serve as co-chairman of organization that shared information concerning juvenile offenders between various groups, including the police, schools, the state attorney, the public defender's office, and the judiciary).

172. *Supra* note 155.

173. Lubet, *supra* note 145, at 996.

174. For example, in ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1516 (Jan. 23, 1986), the ABA ethics committee opined that a judge may not accept an award from "a specialized bar association, whose members customarily represent the same side of cases in litigation involving a certain area of the law and therefore has a clearly identifiable partisan litigation posture." Citing the "appearance of impropriety" standard of Canon 2 of the Code of Judicial Conduct, the committee reasoned that

An award given by a special interest bar association seems almost inevitably to raise an appearance of impropriety, even though no actual impropriety or influence upon a judge may exist . . . . Since acceptance of the award could be seen by the public as a possible indication that the judge favors the views of the association giving the award, it would convey an inappropriate image to the public of undue influence, even if untrue . . . . The acceptance of an award by a judge from an association of lawyers which has a clearly identifiable partisan litigation viewpoint, whose members are likely to appear before the judge, also raises a serious question as to the judge's appearance of impartiality. *But see* Ainsworth v. Combined Ins. Co. of Am., 774 P.2d



There is no indication, however, that any of the three private institutions that sponsor judicial education espouses a litigation objective, such that a judge would be foreclosed from supporting their work through membership or through service as an officer or advisor. Although LEC, FREE and/or LOEC may hold views about the law and how best to resolve certain legal questions, these are, at bottom, educational institutions, not litigation advocacy groups.<sup>175</sup> Moreover, even if these educational institutions were equated with advocacy groups because they espouse general viewpoints about the law, so that a judge could not participate in organizing their activities or serve in an official capacity, a judge could still attend their programs. A judge's mere attendance at a bona fide educational program sponsored by one of these institutions would not create the level of identification between the judge and the institution that would cast doubt on the judge's ability to preside in cases where the institution's views were implicated.<sup>176</sup>

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1003, 1021-22 (Nev. 1989) (permitting judge to receive award from Nevada Trial Lawyers Association (NTLA), without having to later recuse himself in litigation where NTLA members represented a party and NTLA filed amicus brief).

175. If these were considered to be advocacy organizations, it would more likely be impermissible for a judge to become closely involved in their work. In that event, questions might be raised about a judge's participation on an advisory board or as a director or about their financial contributions to a program. If judges' close involvement is allowed, however, their participation in organizing and planning judicial education programs might be encouraged, not only to better ensure that the programs are useful to judges, but to reduce the extent to which the programs are ideologically slanted in one direction or another. It is for this reason that Judge Weinstein has suggested that judicial education programs be co-sponsored by educational institutions and judicial institutions. See Weinstein, *How Many Judges Learn*, *supra* note 84, at 548, 565.

176. See Cal. Judges Assn., Comm. on Judicial Ethics, Op. 47 (Sept. 11, 1997) (stating that judges may not join bar association advocating for limited segment of bar, but may participate in their educational programs), discussed *supra* notes 160-61; Ill. Judicial Ethics Comm., Op. 94-17 (June 17, 1994) (explaining that, although a judge may not be an honoree of groups such as Court Watchers and MADD, which advocate changes in the content or enforcement of the laws, a judge may speak before such a group, because "[m]erely addressing an organization does not carry with it the kind of implicit endorsement of the organization or its agenda that comes from agreeing to be honored by that organization"); N.Y. Judicial Ethics Op. 94-76 (Mar. 10, 1994) (noting that judges may attend social events sponsored by a police association); Wash. Supreme Court, Ethics Advisory Comm., Op. 92-10 (1992) (stating that a judge may participate in seminar presented by State Toxicologist to provide prosecutors with information about breath and alcohol testing); Wash. Supreme Court, Ethics Advisory Comm., Op. 97-10 (1997) (explaining that, although a judge may not act in advisory capacity for agency that offers advocate services for victims of domestic violence, because doing so may cast doubt on the judge's impartiality in domestic violence cases, a judge may participate as a speaker or moderator of an educational symposium organized by the agency); Wash. Supreme Court, Ethics Advisory Comm., Op.

In sum, even if one assumes that the judicial seminars are one-sided,<sup>177</sup> a judge would not generally be forbidden from attending them, any more than a judge would be forbidden from reading books that express a particular viewpoint. Those with differing perspectives might seek other fora in which to present them, and judges might be encouraged to expose themselves to a variety of viewpoints.<sup>178</sup> But judges are not confined to learning in the courtroom; the classroom is generally open to them as well.

### B. Reimbursement

Although it seems plain that judges may pay their own way to attend seminars on subjects such as law and economics, one might argue that judges may not properly accept free tuition, meals, lodging at resort settings, and reimbursement of travel expenses. As Advisory Opinion 67 reflects, these comprise a "gift" of significant value. Various concerns may be raised.

First, as in any situation where a judge receives a gift or payment for extrajudicial services, there is a possibility that judges will favor those from whom they receive the financial benefit. Here, of course, the "gift" comes directly from the educational institutions, which are not expected to be parties in litigation before the judges. However, one might fear that out of gratitude for their contributions to these institutions or a misplaced sense of obligation, judges may favor the corporate contributors. Certainly, judicial favoritism toward a corporate party for indirectly providing something of value to the judge would be highly improper.

Similarly, it might be feared that, out of gratitude for having received the benefit of a free education at a resort setting, judges will employ economics principles or other principles they were taught in judicial seminars, when otherwise they would have employed such principles differently or not at all.

Finally, and more realistically, a concern might be raised that because judges' expenses are paid and some seminars are conducted in resort settings, judges will attend these seminars at the exclusion of others which may be more balanced or reflect a different view. By offering judges, at no expense, an expensive educational pro-

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85-3 (1985) (noting that judges may attend a seminar sponsored by law enforcement agency where a BAC Verifier will be demonstrated).

177. As indicated at the outset, I have made this assumption solely for purposes of this Article's analysis. I would not have the ability to assess whether the seminars are in fact balanced or academically biased.

178. See *Oversight Hearing*, *supra* note 95, at 36 (remarks of Rep. Frank).

gram in a plush locale, those holding particular views on the legal application of economics principles will gain special access to judges and a special opportunity to influence judges' views.

Various responses might be made to these concerns. It might be argued that, realistically, whatever gratitude the judges have toward the educational institutions sponsoring the judicial seminars will not extend to the corporations that contributed toward these institutions and that, in any case, judges' decision making would not be affected by whatever gratitude they possess; that, realistically, judges' views on economics or other subjects taught in judicial seminars, however lavish the settings, will not be influenced by gratitude for the benefit of having attended at no expense; that, given the limited time available and the amount of time and effort required by the law-and-economics seminars in particular, judges' choices among educational opportunities will be determined by their perception of the quality of the program, and not by financial considerations; and that even if forbidding judges from participating might promote the appearance of impartiality, it is more important to encourage ongoing judicial education.

There is room for different resolutions of these competing arguments, as concerns expressed in the media and in Congress demonstrate. Nonetheless, as discussed below, the existing law and judicial canons generally permit judges' attendance at privately funded judicial seminars at no expense and do not require judges to subsequently recuse themselves in cases where a contributor is a party.

### 1. *May Judges Participate in Expenses-Paid Programs?*

The first question is whether judges may participate in expenses-paid programs, or whether, to avoid any appearance of impropriety, judges must decline what Advisory Opinion 67 recognizes to be the "gift" of payment of tuition and expenses. At least for federal judges, this question is essentially governed by provisions of the Code of Judicial Conduct that deal explicitly with the circumstances under which judges may accept gifts and payments.<sup>179</sup> As the Federal Advisory Committee found, judges' participation in the judicial seminars is generally permitted under two specific provisions. The first allows judges to receive a fellowship or scholarship awarded on the same terms as other applicants.<sup>180</sup> This

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179. U.S. Judicial Conference, Advisory Comm. on Codes of Conduct, Op. 67 (1998).

180. *Id.*

provision would apply to private education seminars because the educational programs are generally open either to federal judges or to state judges on an equal basis.<sup>181</sup> The second provision allows judges to accept a gift from any donor whose rights or interests are not likely to be adjudicated in a proceeding before the judge. Since the "gift" comes from an educational institution that is unlikely to appear as a litigant before any particular judge, this provision would also apply.

Also generally applicable is the provision allowing judges to receive compensation and reimbursement of expenses for otherwise permissible extra-judicial activities, if the source of the payments does not appear to influence the judge's performance or otherwise appear improper.<sup>182</sup> Under this provision, judges may accept compensation or reimbursement of expenses for teaching and lecturing<sup>183</sup>—including, no doubt, under the auspices of institutions that espouse particular viewpoints. That the judge's lecture takes place at a lavish setting or that the cost of travel is high does not generally matter, as long as the judge is only reimbursed for actual expenses.<sup>184</sup> If an educational program can compensate and reimburse judges who come to teach, they can also pay the expenses of judges who come to learn, absent circumstances giving rise to "the appearance of impropriety."<sup>185</sup>

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181. It should be noted, however, that the programs are open exclusively to judges (although these educational programs may offer different programs to others). Thus, while a single set of terms and criteria may be used to decide which federal judges or state judges may attend, there is not a single set of criteria for judges and non-judges alike.

182. MODEL CODE OF JUDICIAL CONDUCT Canon 4(H)(1) (1990).

183. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canons 4(B), 4(H)(1) (1990) (permitting a judge to teach, and to receive reasonable compensation for doing so); N.Y. Judicial Ethics Op. 90-128 (Dec. 11, 1990) (stating that a judge may accept reasonable compensation for teaching a seminar presented by an independent institute located on the campus of a private university); cf. N.Y. Judicial Ethics Op. 91-112 (Oct. 31, 1991) (noting that a judge may accept reasonable compensation and reimbursement of expenses for a lecture concerning the criminal courts conducted at a Veterans Administration hospital, but must report the compensation).

184. See N.Y. Judicial Ethics Op. 91-07 (Jan. 24, 1991) (stating that a judge may present a paper on criminal procedure at a symposium held in a foreign country on the American judicial system, as long as reimbursement is "limited to the actual cost of travel, food and lodging incurred by the judge and the judge's spouse").

185. See, e.g., Judicial Qualifications Comm'n of Ga., Op. 15 (Aug. 30, 1977) (advising that, if foundations contribute to the Judicial College of Georgia to support educational programs for judges, "judges may in propriety receive the benefits, including expenses for their attendance at continuing judicial education programs, of contributions by charitable foundations and the like since foundations are fairly infrequently involved in litigation and are generally known and recognized as making contribu-

It would be different, of course, if the seminars were purely pretextual, if judges were not truly coming to learn, and if the reason for bringing judges to resorts was simply to give them a free vacation or to allow certain parties special access to the judges.<sup>186</sup> But no one doubts the academic rigor of the privately-funded judicial seminars. The complaint is not that they do not educate judges, but that, if anything, they educate judges too much on economics principles that, some would say, should not be applied to legal questions in the manner taught. It would be different, too, if judges were reimbursed for more than their actual costs. There is no reason to believe, however, that this occurs, and the judges' reporting obligation provides some assurance that it does not.

One might argue that even in the case of a bona fide educational program, judges should not be permitted to take advantage of certain amenities that are simply expensive and unnecessary. It would be harder to justify judges' participation in economics seminars if they took place on the Riviera. As Judge Weinstein recognized, it does not follow that the seminars must be offered in spartan settings.<sup>187</sup> A comfortable setting serves a pedagogic function.<sup>188</sup> Continuing education programs, such as those sponsored by bar associations, are often held in resort settings.<sup>189</sup>

The Advisory Committee's conclusion—that, ordinarily, judges may participate in privately sponsored educational programs as a matter of individual discretion—is consistent with the way other

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tions to worthwhile causes without expectation of gain or benefit by such charitable foundations").

186. Cf. Ga. Judicial Qualifications Comm'n, Op. 13 (July 7, 1977) (opining that a judge may not accept a law firm's invitation to attend an out-of-state, weekend outing); Nassau County Bar Ass'n, Ethics Op. 83-1 (Jan. 31, 1983) (opining that a lawyer may not invite judges to a function, party or dinner solely for the benefit of the judiciary, because "then the function would violate the prohibition on offering a gift or gratuity to Court personnel"); N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 706 (Sept. 15, 1998) (opining that a lawyer may not host a holiday party for local judges and law clerks where the only other guests are attorneys in the lawyer's law firm).

Where the lawyer's invitation to the judges is not incidental to an event that would in any event take place, but the party is instead targeted at the judiciary and the other participants are exclusively lawyers associated with the lawyer, the event has an appearance of impropriety. The public can reasonably infer that the social event has been held to curry favor for the firm's attorney's with the judiciary before whom the firm practices to obtain inappropriate advantage in matters before the court.

*Id.*

187. Weinstein, *How Many Judges Learn*, *supra* note 84, at 550-51.

188. *Id.*

189. *Id.*

advisory committees have interpreted judicial codes. For example, a judicial advisory committee in New York State concluded several years ago that judges may participate in a judicial education program dealing with land use issues that was sponsored and conducted by the National Judicial College, notwithstanding the fact that program expenses, including travel and lodging, would be paid by the College out of grant money provided by a non-profit trade association whose membership included home builders, contractors and others in the housing industry, some of whom were located in New York State.<sup>190</sup>

The grant by the trade association to the College may be likened to a grant to an educational institution which retains full discretion to choose faculty and determine the content of the course of study. Here, the intended program is under the discretion and control of the National Judicial College, not the entity that is providing the funding; and, further, the selection of those who may attend the program rests with the court system.<sup>191</sup>

The Advisory Committee's conclusion is also consistent with how the judicial codes are understood in related contexts.<sup>192</sup> In particular, it is consistent with the prevailing understanding that judges may attend bar association programs at no expense,<sup>193</sup> even though bar associations may appear before the courts as parties or

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190. N.Y. Advisory Comm. on Judicial Ethics, Op. 96-106 (Sept. 5, 1996).

191. *Id.* Recently, a judicial advisory committee in Arizona addressing the programs of LOEC and FREE, among others, similarly concluded that "there is no general ethical impropriety in attending expenses-paid educational programs sponsored by non-governmental organizations." Ariz. Sup. Ct. Judicial Ethics Advisory Comm., Op. 00-02 (Apr. 9, 2000). The opinion identified various conditions and limitations, however, including that corporate or foundation funding must be indirect, the sponsoring organization may not be appearing in litigation before the judge, compensation may not exceed actual expenses, and the judge must report the compensation as a gift. *Id.*

192. *See, e.g.*, Cal. Judges Ass'n, Comm. on Judicial Ethics, Op. 39 (June 27, 1988) (stating that a judge may accept travel expenses from an organization, allowing the judge to participate in a study tour of a foreign country's legal system, when the sponsoring organization and the persons or organizations funding the program are not likely to have an interest in matters coming before the judge); State Bar of Mich., Comm. on Prof'l and Judicial Ethics, Op. CI-549 (July 28, 1980) (finding that a judge and spouse may attend an all-expense paid four-day semi-annual union meeting if the union and its members are not likely to come before the judge).

193. *See, e.g.*, *In re Wiley*, 671 A.2d 308, 309 (R.I. 1996). In this opinion, the Rhode Island Supreme Court held that a judge may attend the annual dinner dance of the Rhode Island Trial Lawyers Association (RITLA) as the bar association's guest, a conclusion which, as discussed in the opinion, was consistent with how other states had interpreted their judicial codes. *Id.* at 308 (referring to interpretations of California, Georgia, Maryland, New York, Oregon and South Carolina). The court reasoned in part:

as *amicus curiae* and even though their members regularly appear before the courts on behalf of clients.

It is ordinarily left to the discretion of individual judges whether to attend bar association programs at no expense.<sup>194</sup> Even when the sponsoring bar association or the particular event is explicitly oriented toward a specific legal perspective, judges may be permit-

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We believe that judges in this state should be encouraged to participate in bar-related activities whether conducted by the Rhode Island Bar Association or by other groups including RITLA whose objectives are concerned with the improvement of the administration of justice and the legal system . . . .

. . . .

[O]ur analysis of the Code of Judicial Conduct in the light of opinions rendered in other jurisdictions and the commentary that accompanies the code causes us to believe that judges should not be required to live in isolation. Canon 4B and its commentary affirmatively encourage a judicial officer to contribute to the improvement of the law, the legal system, and the administration of justice either independently "or through a bar association, judicial conference or other organization dedicated to the improvement of the law."

*Id.*; see also Md. Judicial Ethics Comm., Op. 91 (Mar. 2, 1981) (finding that a judge may accept invitations to bar association functions, with or without paying); Wash. Supreme Court, Ethics Advisory Comm., Op. 91-8 (noting that a judge may attend dinner hosted by bar association, where bar association will pay all expenses).

194. For example, in Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 95-8 (June 2, 1995), the Board concluded that a judge may accept an offer from a trial lawyers association to attend its annual meeting without paying a registration fee:

Gifts are regulated under Canon 5C(4) of the Ohio Code of Judicial Conduct. Although many gifts are prohibited, a few gifts are permitted "as a matter of common sense and in deference to common usage." See E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 84 (1973). Under Canon 5C(4) a judge may accept an invitation to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice . . . .

An annual seminar of a trial lawyers association is a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice. The interchange of information among lawyers and judges in an educational setting improves the law, the legal system, and the administration of justice. An invitation by a trial lawyers association to a judge to attend its seminar at no cost is therefore an acceptable gift under Canon 5C(4)(a).

. . . .

Canon 2 requires that "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His [Her] Activities." Before accepting any Canon 5C(4)(a) gift, "the circumstances surrounding each gift must be considered to determine if the requirement of Canon 2 is met." E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct, 84 (1973). Individual circumstances may dictate that an otherwise acceptable gift should not be accepted, but each judge must make that determination.

ted to participate.<sup>195</sup> Further, as Judge Weinstein noted, judges accept free travel to, and lodging at, bar association programs held at expensive resorts.<sup>196</sup> Although the amount of time devoted to legal education at such programs is small, interaction between the bench and bar is considered to be worthwhile. The reasoning of a 1996 Rhode Island Supreme Court decision, holding that a judge may attend a bar association program as its guest, seems equally applicable to the question of whether judges may attend a seminar as a guest of the educational institution sponsoring it:

Judges should participate in activities of the Rhode Island Bar Association and other similar groups and organizations that are dedicated to the improvement of the legal system. Of course, judges should avoid contamination by inappropriate relationships with those who might seek by *ex parte* communication to influence the judge on a pending case. However, avoiding intel-

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195. In Ill. State Bar Ass'n, Op. 86-19 (June 17, 1987), a committee opined that a bar association may bear the expense of having judges attend their functions, even if it is oriented toward attorneys representing a class of litigants (e.g., plaintiffs or defendants).

The presence of judges at bar association gatherings, where, presumably, all members of the association may attend, does not give rise to the possibility of undue influence as may be present in private golf-outings or boat rides . . . . [M]any diverse bar associations have been formed. We are aware that some of these associations are plaintiff oriented while others are defense oriented, while still others may be neither—nevertheless, we believe that full and open exchange of ideas, philosophies and the like between lawyers and the judges should be fostered and we further believe that the bar association's functions are a proper and healthy forum for these exchanges.

See also Advisory Comm. on Judicial Conduct of the District of Columbia Courts, Op. 4 (Feb. 22, 1994) (opining that there is no *per se* bar on judges' attendance at functions of a specialty bar at no expense, but identifying factors relevant to whether the judge's participation would create an appearance of partiality); [Ore.] Judicial Conference, Judicial Conduct Comm., Op. 81-1 (1982) (opining that judges may attend, at reduced or no tuition, educational seminars and conferences sponsored by bar associations, including those that represent particular interest groups within the bar); Washington Ethics Advisory Op. 91-27 (in deciding whether to attend a function of a specialized segment of the bar on a complimentary basis, "[j]udges should determine whether their position will be exploited or whether their impartiality might be called into question" but should also "keep in mind the isolation which might result if they declined outright all invitations extended by such groups"); but see Alaska Comm'n on Judicial Conduct, Op. 99-5 (Dec. 14, 1999) (concluding that judge may not accept free travel to attend a conference of a bar association affiliated with the plaintiff's bar); [Tenn.] Judicial Ethics Comm., Op. 96-4 (June 27, 1996) (judge may not accept invitation to attend, at no expense, a three-day convention of a defense lawyer's association). Supreme Court of Wisconsin, Judicial Conduct Comm., Op. 98-10R (Nov. 18, 1998) (although judge may generally attend a reasonably priced bar association dinner at no expense, judge may not do so if the association is so specialized that all its members represent the same side in litigation).

196. Weinstein, *How Many Judges Learn*, *supra* note 84, at 550-51.



lectual exchange among lawyers and academics may lead the judge to a form of mental asphyxiation that will diminish his or her effectiveness. A judge should not be isolated from the current of ideas abroad in his or her profession or those that may be contributed by related disciplines. Attendance at meetings of bar associations and such organizations as RITLA will stimulate the judge's thought processes whether the judge agrees or disagrees with the positions that may be taken by these organizations.<sup>197</sup>

The federal Advisory Committee's conclusion is also consistent with the rules dealing with judges' involvement with not-for-profit institutions. The judicial codes distinguish for-profit entities from charitable foundations and educational institutions. For example, Canon 4(B)(3) specifically permits a judge to serve as an officer, director, trustee, or non-legal advisor of an organization devoted to the improvement of the law, the legal system, or the administration of justice or of an educational or charitable organization, as long as the organization is unlikely to be engaged in proceedings before the judge or the judge's court.<sup>198</sup> Although judges may not participate in fund raising, they are not forbidden from otherwise working with a not-for-profit institution, even if the institution is financially supported by entities or individuals who may appear in litigation.<sup>199</sup> Thus, the codes recognize a common sense distinction

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197. *In re Wiley*, 671 A.2d at 310.

198. See, e.g., ABA Comm. of Ethics and Prof'l Responsibility, Informal Op. 88-1525 (1988) (opining that a judge, in role as president of an international charitable foundation, may deliver the president's report to the foundation's biennial convention).

199. Indeed, although a judge may not personally participate in the solicitation of funds, a judge may assist the organization in planning fund raising. See, e.g., Cal. Judges Assn., Comm. on Judicial Ethics, Op. 41 (July 8, 1989) (noting that a judge may assist in fund raising efforts in a variety of ways that do not promote attendance at fund raising event or donations). Further, even in the rare situation where a judge is discouraged from assisting an organization in fund raising through means aside from solicitation, lest the judge's participation cast reasonable doubt on the judge's impartiality, a judge would not be forbidden from being a member of the organization and participating in law-reform or other non-fund raising activities. See, e.g., Ind. Comm. on Judicial Qualification, Advisory Op. 1-96 (1996) (stating that a judge may not be guest of honor at a fund raising event, because the presence of a guest of honor is ordinarily intended to motivate potential donors to attend; ordinarily, however, a judge may be listed as a committee member or honorary committee member in conjunction with a fund raising activity or event, except where such participation will cast doubt on the judge's impartiality, e.g., if the judge will have contact with potential donors, the group of donors is small, their likely contributions are substantial, and they are likely to appear in litigation before the judge).

between a not-for-profit institution and its financial supporters.<sup>200</sup> Even a judge's involvement as an officer of an educational institution does not give rise to a realistic concern that the judge will favor its financial supporters in litigation. The same ought to be true where a judge attends an educational institution's program. Assuming there may be legitimate cause for concern that the judge would favor the educational institution,<sup>201</sup> there should be no realistic concern that the judge would favor its contributors.

In states where government ethics statutes cover state judges, this is not the end of the inquiry. In some states there is no statute supplementing the applicable judicial code.<sup>202</sup> In other states, statutory provisions concerning judicial conduct do not specifically address the receipt of gifts and would appear to permit judges to

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200. A similar distinction might fairly be made between charitable foundations, which do not ordinarily appear before the courts, and potential individual or corporate donors who are more commonly parties in litigation. *See, e.g.,* Tex. Comm. on Judicial Ethics, Op. 238 (1999) (noting that as an authorized representative of a not-for-profit organization, such as the Texas Center for the Judiciary, Inc., that is devoted to the improvement of the law, the legal system, or the administration of justice, "a judge may solicit contributions only from charitable and educational foundations and other donors who would not ordinarily come before the court").

201. *Cf.* Fla. Judicial Ethics Comm., Advisory Op. 98-7 (May 28, 1998) (opining that a judge may not sign or circulate petition to have victims of unresolved murder case honored on a U.S. postage stamp, because, if someone is charged with the murders, which occurred nearly 50 years earlier, and the case appeared before the judge, reasonable doubt would be cast on the judge's capacity to act impartially); N.Y. Advisory Comm. on Judicial Ethics, Op. 92-22 (Mar. 16, 1992) (stating that a judge may generally have lunch with a lawyer friend who may appear in litigation before judge, but should not do so during the course of a trial in which the lawyer is appearing before the judge); N.Y. Advisory Comm. on Judicial Ethics, Op. 91-132 (Oct. 31, 1991) (noting that a judge who presided over a murder trial may not subsequently attend an appreciation luncheon held by relatives of murder victims; attending the lunch would involve "an appearance of impropriety, especially as the invitation explicitly states that it is an 'appreciation' luncheon 'in your honor' and thanking the invited guests for 'your love and support'"); N.Y. Advisory Comm. on Judicial Ethics, Op. 90-164 (Dec. 11, 1990) (concluding that where a judge presided over hearings that resulted in a civic organization obtaining a lease in a historic city owned building, the judge may not later accept complimentary tickets to a benefit dinner given by the organization to support the restoration of the building; "[a]lthough judges may attend civil organizations' fundraising events . . . judges [must] avoid the appearance of impropriety and avoid conveying the impression that they are in the position to advance the private interests of others. Attending the dinner of an organization which benefited from a decision of the judge, even though the organization was not a party, may convey the impression that the judge is receiving a reward from the organization for rendering a favorable decision").

202. For instance, in Florida, although there is a generally applicable Ethics in Government statute, it has been found by the state's supreme court to be inapplicable to the judiciary on separation of powers grounds. *See In re Florida Bar*, 316 So. 2d 45, 47 (Fla. 1975).

participate in expenses-paid judicial seminars insofar as they may do so under the applicable judicial code.<sup>203</sup> In some states, however, a statute specifically addresses judges' receipt of gifts, honoraria, compensation and the like.<sup>204</sup> In such states, one must consider whether the applicable statute permits judges to accept free tuition, lodging, meals and travel in connection with educational programs.

The question of whether government ethics statutes apply to judges and, if so, how they apply to participation in expenses-paid judicial seminars, may vary from state to state. However, it does not appear that, as a general rule, state statutes addressing judges' receipt of gifts forbid judges from participating. For example, in Ohio, a judge's receipt of gifts is regulated not only by the Ohio Code of Judicial Conduct, but also by Ohio Ethics Law, which forbids a public official from accepting, or using his or her office to obtain, "anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties."<sup>205</sup> It has been held that "If a thing of value is more than nominal or de minimus [and it] is from a party that is interested in matters before, regulated by, or doing business with the public official's . . . agency it is considered an improper influence."<sup>206</sup> Under the Ohio law, a judge may attend a bar association meeting without paying a registration fee because "an offer to attend a seminar at no cost is in most instances nominal or de minimus to a judge since the judge is required to attend seminars and seminars have little likelihood of influencing a judge with respect to his or her official duties."<sup>207</sup> While the value of economics seminars at resort settings is more than "de minimus or nominal," judges may still be allowed to participate:

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203. See, e.g., N.Y. CONST. art. VI, § 22; IND. CODE ANN. § 33-2.1 (Michie 1998); MICH. STAT. ANN. §§ 15.301-15.310, 15.341-.348, 15.321-15.328 (Michie 2001); MINN. STAT. ANN. § 10A (West 1997); N.J. STAT. ANN. § 52:13D-13 (West 2001); N.Y. JUDICIARY LAW CT. ACTS § 14 (McKinney 1983); OKLA. STAT. ANN. tit. 5, ch. 1, App. 4 (West 2001).

204. See, e.g., CAL. CIV. PRO. CODE § 170.9 (West 2002); GA. CODE ANN. § 21-5-11 (2001); 5 ILL. COMP. STAT. ANN. 425/1-10 (West 2001); MD. CODE ANN., STATE GOV'T § 15-505 (2000); MASS. ANN. LAWS ch. 268A, § 2 (Law Co-op. 1992); OHIO. REV. CODE ANN. § 120.03(E) (Anderson 1997); 65 PA. CONS. STAT. ANN. § 1103(c) (West 2000); TEX. GOV'T CODE ANN. § 572.051 (Vernon 2002); VA. CODE ANN. § 2.1-.639.4 (Mitchie); WASH. REV. CODE ANN. § 42.52.140-.150 (West 2000).

205. Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 95-8 (June 2, 1995) (quoting OHIO REV. CODE ANN. § 103.03).

206. *Id.* (citing authority).

207. *Id.*

A public official or employee may accept travel, meals, and lodging or expenses or reimbursement of expenses for travel, meals and lodging in connection with conferences, seminars, and similar events related to official duties if the travel, meals and lodging, expenses, or reimbursement is not of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.<sup>208</sup>

Since the educational institutions sponsoring the programs are unlikely to be parties with an interest in matters before the court, it seems unlikely that judges' decision making will be influenced by receiving free tuition, meals and lodging, and reimbursement of travel expenses.<sup>209</sup> Likewise, in California,<sup>210</sup> Illinois,<sup>211</sup> Mary-

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208. OHIO REV. CODE ANN. § 102.03(I) (Anderson 1997).

209. *Cf.* Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 92-14 (Aug. 14, 1992) (opining that magistrates may not accept financial support for educational program from law firms, individuals and businesses interested in matters before, regulated by, or doing or seeking to do business with the courts and reserving question whether low registration fees and free lodging could be viewed as an impermissible supplement to the magistrates' salary under OHIO REVISED CODE ANN. § 2921.43 (Anderson 1997)).

210. California's statutory restriction on judges' receipt of gifts, *see* CAL. CIV. PRO. CODE § 170.9 (West 2002), contains exceptions that appear to permit California state judges to attend the judicial seminars offered by organizations like LOEC. First, the statute's definition of "gift" specifically excludes "free . . . tuition . . . for informational conferences or seminars." *Id.* at § 170.9(l)(1). Second, the statute permits "reimbursements for travel, including actual transportation and related lodging and subsistence which is reasonably related to a judicial or governmental purpose" in various circumstances, including where "[t]he travel is provided by . . . a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, or a nonprofit charitable or religious organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code . . ." *Id.* at § 170.9(e); *cf.* Cal. Judges Ass'n, Judicial Ethics Update 8 (Jan. 1997) ("If a judge is asked to participate in an educational program, reimbursement of registration, meals and lodging costs are not gifts."); *id.* at 9 ("A judge and spouse may accept reimbursement for transportation, meals, and lodging to attend a week-long function at a foreign resort sponsored by the local bar association. The judge will participate in 1-2 hour seminars each day.").

211. In Illinois, the State Gift Ban Act, 5 ILL. COMP. STAT. ANN. 425/1 (West Supp. 2001), applies to judges and provides that "[e]xcept as otherwise provided in this Act, no . . . judge shall solicit or accept any gift from any prohibited source or in violation of any federal or State statute, rule or regulation . . . No prohibited source shall offer or make a gift that violates this Section." 5 ILL. COMP. STAT. ANN. 425/10 (West Supp. 2001). "Prohibited source" is defined, *inter alia*, as any person who or entity which "is seeking official action by the . . . judge," "does business or seeks to do business with . . . the judge," "conducts activities regulated by . . . the judge," or "has interests that may be substantially affected by the . . . judge." *Id.* at 425/5. Exceptions include the following: (i) "[t]raining (including food and refreshments furnished to all attendees as an integral part of the training) provided to a . . . judge, if the training is in the interest of the governmental entity," *id.* at 425/15(13), (ii) "[e]ducational missions,

land,<sup>212</sup> Massachusetts,<sup>213</sup> Pennsylvania,<sup>214</sup> Texas,<sup>215</sup> Virginia,<sup>216</sup> and

including meetings with government officials either foreign or domestic, intended to educate public officials on matters of public policy, to which the . . . judge may be invited to participate along with other federal, state, or local public officials and community leaders,” 425/15(14), or (iii) “[f]ree attendance at a widely attended event permitted under section 20,” *id.* at 425/15(18). In turn, subsection 20 provides that “[a] . . . judge may accept an offer of free attendance at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, provided by the sponsor, if (1) the . . . judge participates in the event as a speaker or a panel participant, by presenting information related to government, or by performing a ceremonial function appropriate to the . . . judge’s official position or employment; or (2) attendance at the event is appropriate to the performance of civic affairs in Illinois or the official duties or representative function of the . . . judge.” *Id.* at 425/20. The Act also contains a section providing that reimbursement “for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, fact finding trip or similar event in connection with the duties of the . . . judge . . . shall be deemed to be reimbursement to the governmental entity and not a gift prohibited by this act” if it is properly disclosed. *Id.* at 425/30. Given the breadth of this provision, judges’ reimbursement by the programs appears to be permissible. Assuming that the seminars at issue can fit within the meaning of section 20—that is, a widely attended symposium at which the judge participates as a speaker or a panel participant—free tuition would be permissible. Moreover, fee reimbursement or free tuition should also be permissible if the law-and-economics seminars can be classified as “[e]ducational missions” or “[t]raining.”

212. In Maryland, there is a general prohibition against judges (and other public officers) accepting gifts, *see* MD. CODE ANN., STATE GOV’T § 15-505(b) (2000); however, there is also a specific exception for receipt of “reasonable expenses for food, travel, lodging or scheduled entertainment” if the expenses are associated with a panel or speaking engagement at which the official participated. § 15-505(c)(2)(vi). This exception is available so long as reimbursement does not give the appearance of impairing judicial neutrality and the recipient has no reason to believe that the gift is designed to impair his or her neutrality. *Id.* Thus, the gift restrictions appear to permit judges to attend.

213. The gift restrictions in Massachusetts are primarily concerned with quid pro quo arrangements. *See* MASS. ANN. LAWS ch. 268A, §§2-4 (Law. Co-op. 1992). As there has been no allegation of any quid pro quo arrangements in the case of judicial education programs, these provisions are inapplicable.

214. In Pennsylvania, the Public Official and Employee Ethics Acts prohibits public officials, *inter alia*, from (i) “solicit[ing] or accept[ing] anything of monetary value, including a gift . . . based on any understanding of that public official . . . that the . . . judgment of the public official . . . would be influenced thereby,” 65 PA. CONS. STAT. ANN. § 1103(c) (West 2000); and (ii) accepting honoraria, § 1103(d). Although there is no specific safe harbor for judicial education seminars, these provisions should not bar judges from attending the programs at issue because the benefits conferred—tuition and reimbursed travel expenses—cannot reasonably be seen as conditioned on judges taking official action in favor of the donor. Nor can cost-free attendance at such seminars be properly understood as honoraria, which the act defines as “[p]ayment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of such services which are nonpublic occupational or professional in nature.” § 1102.

215. In Texas, judges (and other state officers) are prohibited from

(1) accept[ing] or solicit[ing] any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or

Washington<sup>217</sup>—government ethics statutes, insofar as they apply

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that the officer or employee knows or should know is offered with the intent to influence the officer's or employee's official conduct;

....  
 (3) accept[ing] other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's duties;

....  
 (5) intentionally or knowingly solicit[ing], accept[ing], or agree[ing] to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.

TEX. GOV'T CODE ANN. § 572.051(1), (3), (5) (Vernon 2001). "Gift," "favor," and "service" are not defined terms under chapter 572, nor are there any available safe harbors. However, judges' participation in the education seminars at issue should not present a difficult question. With respect to subsection (3), a judge's attendance at a judicial education seminar cannot "reasonably be expected to impair" his or her "independence of judgment" given the intellectual independence and sophistication of judges. Under subsection (5), there is no evidence of any quid pro quo arrangement. Finally, although the language of subsection (1) is broad, read in light of the provisions' legislative purpose attendance presents little problem. *See* § 572.001(a) ("It is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in *substantial conflict* with the proper discharge of the officer's or employee's duties in the public interest.") (emphasis supplied).

216. In Virginia, the statutory ethics provisions applicable to judges provide that "[n]o officer or employee of a state or local governmental or advisory agency shall

1. Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee . . . .

....  
 5. Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties . . . .

....  
 8. Accept a gift from a person who has interests that may be substantially affected by the performance of the officer's or employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality in the matter affecting the donor . . . .

9. Accept gifts from sources on a basis so frequent as to raise an appearance of the use of his public office for private gain . . . .

VA. CODE ANN. § 2.2-3103 (Michie 2001). For reasons discussed in note 216 *supra*, these provisions should not (as a general matter) present difficulties for judges wishing to attend the programs.

217. In Washington, although there are general legislative proscriptions on judges' (and other public officers') acceptance of gifts, *see* WASH. REV. CODE ANN. § 42.52.140-150 (West 2001), there are safe harbor provisions applicable in this context. Specifically, judges may permissibly receive free of cost "[i]nformational material, publications, or subscriptions related to the recipient's performance of official duties," § 42.52.150(2), and "[p]ayment of enrollment and course fees and reasonable

to judges, have provisions that appear to permit participation in educational programs as an exception to restrictions on the receipt of gifts.<sup>218</sup>

In sum, the judiciary's conclusion that judges are not legally or ethically forbidden from participating in privately-funded education seminars and that the decision whether to attend is for judges to make individually,<sup>219</sup> reflects a fair reading of the law. This implies, of course, that judges must be given accurate information about the seminars when they are invited, so that they can decide for themselves whether it is proper to attend. Insofar as any program provided misleading information, it might fairly be criticized. But there is nothing to indicate that judges attending these programs are being misled about what to expect.

## 2. *Must Judges Be Recused From Cases Involving Contributors?*

The second question is whether judges who attend a seminar must later recuse themselves in cases involving a corporate contributor to the program or a party affiliated with a contributor.

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travel expenses attributable to attending seminars and educational programs sponsored by a bona fide governmental or nonprofit professional, educational, trade, or charitable association or institution." § 42.52.010(10)(f). "As used in this subsection, 'reasonable expenses' are limited to travel, lodging, and subsistence expenses incurred the day before through the day after the event." *Id.*

218. In at least one state, Georgia, the government ethics statute, insofar as it applies to judges, arguably limits their attendance at privately funded judicial education programs. In Georgia, the primary statutory ethical strictures are set forth in title 21, section 5, entitled "Ethics in Government." Section 11 restricts acceptance of monetary fees and honoraria:

(a) No public officer other than a public officer elected state wide shall accept a monetary fee or honorarium in excess of \$101.00 for a *speaking engagement, participation in a seminar, discussion panel*, or other activity which directly relates to the official duties of that public officer or the office of that public officer.

(b) No public officer elected state wide shall accept any monetary fee or honorarium for a *speaking engagement, participation in a seminar, discussion panel*, or other such activity.

219. GA. CODE ANN. § 21-5-11 (2001) (emphasis supplied). Subsection (c), however, provides a safe harbor: "For purposes of this chapter, actual and reasonable expenses for food, beverages, travel, lodging, and registration for a meeting which are provided to permit *participation in a panel or speaking engagement* at the meeting shall not be monetary fees or honoraria." *Id.* at § 21-5-11(c) (emphasis supplied). This safe harbor, however, does not by its terms cover "participation in a seminar"; thus, attendance at privately funded judicial education programs comes within the confines of the safe harbor only in the event that it is considered to be "participation in a panel or speaking engagement." *Id.* Cf. Cribbet, *supra* note 143, at 81 ("The acceptance of expenses and a modest honorarium [for public lectures] . . . probably have to be left to the conscience of the individual judge and to the report on sources of outside income.").

If the seminars included discussions of the facts of the case, then the judge's disqualification would be required by the applicable disqualification statute or judicial ethics code. Judges may not participate in cases when they have extrajudicial knowledge of disputed evidentiary facts.<sup>220</sup> However, there is no indication that the seminars include discussions of the facts of pending or future litigation. Judges would not be required to recuse themselves under these provisions simply because economics principles discussed in a seminar may be applicable in a later case.

Nor does the judge's possible gratitude to corporations that contributed to the judicial seminars constitute a disqualifying bias. One might speculate that the judge would have an incentive to favor contributors (or their affiliates) either out of personal interest (*i.e.*, the hope of being personally rewarded for favorable rulings by being invited to future programs)<sup>221</sup> or out of a broader institutional interest (*i.e.*, in hope that a favorable ruling will encourage contributions to future programs from which judges generally benefit). These interests, however, are too speculative and remote to require recusal. This is certainly true as a constitutional matter since under the Due Process Clause, judges must recuse themselves only when they have a "direct, personal, and substantial" interest in the outcome of a case,<sup>222</sup> but it is no less true under the disqualification statutes.

Although it might be argued that disqualification is necessary because the judge's "impartiality might reasonably be questioned,"<sup>223</sup> decades of case law, which give meaning to the disqualification statutes, make clear that

in order to constitute a cognizable ground for judicial disqualification [based on a judge's financial interest in a party or pending proceeding], a judge ordinarily must have a real, certain, present, immediate, and demonstrable financial interest in the subject matter of the proceeding before her, and one that is capable of estimated monetary value.

Thus, where the interest possessed by the challenged judge is either indirect, attenuated, contingent, incidental, remote, speculative or inconsequential, it is generally not the kind of interest

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220. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (1990).

221. This speculation is counterfactual, since the contributors have no control over who is invited and there is no indication that the selection process takes account of the judge's prior decisions or leanings.

222. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-26 (1986).

223. 28 U.S.C. § 455(a) (1994).



that would reasonably bring her impartiality into question or warrant disqualification.<sup>224</sup>

The possibility is simply too remote and conjectural that a judge will favor a party in litigation because it, or an entity with which it is affiliated, contributed to an educational institution that sponsored a seminar attended by the judge.<sup>225</sup> The possibility that the judge will later benefit by being invited to future seminars is too conjectural—especially where, as in the case of the law-and-economics seminars, donors have no control over who is invited. Further, the judge's relationship with the donor is too indirect to require recusal.<sup>226</sup>

There is one notable case, *In re School Asbestos Litigation*,<sup>227</sup> in which a judge was disqualified from continuing to participate in a litigation after having attended an education program which paid

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224. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION 208-10 (1996) (citing authorities).

225. See *In re United States*, 666 F.2d 690, 695-96 (1st Cir. 1981) (holding that a judge is not required to recuse himself where a defendant previously acted favorably toward a governmental administration for which the judge worked; even assuming the judge felt gratitude for past favors, "it is beyond contemplation that such gratitude would be of the weight necessary to cause a judge to jettison his impartiality and, in open court day after day, to violate his deepest professional and ethical commitments as a judge . . . . If the receipt by a judge's friend of a favor long ago from one who is a present litigant should disqualify the judge, judges could hope to preside without challenge solely in communities in which they are strangers"); see also FLAMM, *supra* note 224, at 179 ("[T]he fact that a judge received a gift or favor from an attorney prior to the inception of a pending proceeding is not ordinarily considered to be disqualifying per se.").

226. Judges need not automatically recuse themselves when their former lawyers, law partners, or employers are involved in a proceeding. See, e.g., *McKeague v. Talbert*, 658 P.2d 898 (Haw. 1983) (recusal not automatically required where judge's former attorney appears in proceeding); *Ariz. Judicial Ethics Advisory Comm.*, Advisory Op. 95-11 (June 16, 1995) (same); *Okla. Judicial Ethics Advisory Panel*, Judicial Ethics Op. 99-3 (Apr. 1999) (same); *Okla. Judicial Ethics Advisory Panel*, Judicial Ethics Op. 98-18 (Oct. 12, 1998) (opining that recusal is not automatically required where a judge's former partner or a employer is a party). It would therefore seem anomalous to require disqualification simply because a party in the proceeding is a contributor to a judicial education program that the judge once attended. The judge's former connection with the contributor is far more tenuous than the connection to a former lawyer, law partner, or employer. The result might be different—certainly, many judges would see it as different—if one of the institutional sponsors of the seminars (e.g., LEC) itself appeared in litigation before a judge who was then attending one of these seminars. See, e.g., Weinstein, *How Many Judges Learn*, *supra* note 84, at 551 (discussing Justice Scalia's participation in a case involving the Kentucky Bar Association, after accepting a fee to speak at a function sponsored by the Kentucky Bar Association at the University of Kentucky Law School); see also *In re Seraphim*, 294 N.W.2d 485 (Wis. 1980) (sanctioning judge, in part, for accepting favorable car rental arrangement from local company during and after its appearance before him).

227. *In re Sch. Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992).

for his expenses.<sup>228</sup> In that case, U.S. District Judge Kelly, while presiding over an asbestos-related class action, granted the plaintiffs' application to use \$50,000 from the settlement fund to help finance a conference on the dangers of asbestos. Thereafter, the organizers invited various state and federal judges to attend the conference. The organizers waived the judges' registration fees and provided hotel accommodations.<sup>229</sup> Fifteen judges attended the conference, including Judge Kelly, who had forgotten that the conference was supported by the settlement funds. The organizers' promotional literature made reference to the judges' appearance.<sup>230</sup> Although the court of appeals did not identify any problem with the other judges' attendance, the court found that Judge Kelly was required to recuse himself because "a reasonable person, knowing all the circumstances, might question the district judge's continued impartiality."<sup>231</sup> The court gave the following reasons for its decision:

[Judge Kelly] attended a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs, largely with funding that he himself had approved; and his expenses were largely defrayed by the conference sponsors with those same court-approved funds. Moreover, he was, in his own words, exposed to a Hollywood-style "pre-screening" of the plaintiffs' case: thirteen of the eighteen expert witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial. We need not decide whether any of these facts alone would have required disqualification, for . . . we believe that together they create an appearance of partiality that mandates disqualification.<sup>232</sup>

It seems clear from the opinion that recusal was not required simply because the judge had his expenses paid to attend a conference dealing with issues relating to asbestos cases. On the contrary, the court found it "admirable" that the judge held the "view that judicial education about the scientific aspects of these cases would improve judicial case management."<sup>233</sup> What made Judge Kelly's situation uniquely troublesome was that the expenses of the conference, and his own expenses, were defrayed by funds that the

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228. *Id.* at 779.

229. *Id.* at 780.

230. *Id.*

231. *Id.* at 781.

232. *Id.* at 781-82.

233. *Id.* at 778-79.

judge himself had approved, and that the presenters at the conference previewed the testimony that they were to give in the very case before the judge.<sup>234</sup> The judicial seminars do not present these problems.

In sum, disqualification provisions, as conventionally interpreted, do not require judges who attend judicial seminars to recuse themselves from participating in cases where a party is a contributor or is affiliated with a contributor to these programs.<sup>235</sup> This is not to say that a judge who has attended a law-and-economics program is without discretion to recuse himself or herself in cases where the program's contributors, or affiliated corporations, are parties.<sup>236</sup> The point is simply that, under generally prevailing understandings, the judge would not clearly be required to do so.

### III. THE LIMITS OF JUDICIAL REGULATION

Consistent with how courts have interpreted and applied relevant judicial regulation in related contexts, judges have concluded that it is ordinarily permissible to attend expenses-paid judicial seminars sponsored by LEC, LOEC, and FREE on subjects such as law and economics or environmental law, even though the presentations may be biased in favor of the legal interests of the corporations that fund them. As discussed earlier,<sup>237</sup> this is evi-

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234. *But cf.* Supreme Court of N.J., Advisory Comm. on Extrajudicial Activities, Op. 15-89 (stating that a judge may attend, all expenses paid, a symposium and conference, sponsored by the National Judicial Conference and funded by both sides of the Johns-Manville asbestos litigation, designed for judges with three or more Johns-Manville asbestos cases to explore issues and strategies of their management).

235. Some might, however, make the further argument that if the judge's disqualification is not required under the governing standards, the judge should not respond to pressure to recuse himself or herself. *See* Rehnquist, *supra* note 138, at 713 ("I do not think our profession will be well served by the creation of a climate of professional opinion in which the kudos invariably go to the judge who is quickest to disqualify himself . . . . Far more important than unanimity as to particular standards of disqualification is the recognition that outside of the area of corruption or reasonable suspicion of improper motives, disqualification is an issue to be decided by rational application of the governing standards to the facts of the case in a lawyer-like way.")

236. To make this discretionary decision, a judge who previously attended a privately-funded judicial seminar or who plans to attend one must be able to ascertain that a corporate party or other party appearing in litigation before the judge was a contributor, or was affiliated with a contributor, to the organization sponsoring the seminar. This suggests, first, that organizations sponsoring judicial seminars should make lists of their contributors available to judges who participate and who are invited to do so. This suggests, additionally, that to enable other parties to alert the judge to the question of recusal, these organizations should make lists of both contributors and judicial participants available to the public.

237. *See supra* text accompanying note 63.

dently the view of individual judges who have attended the seminars. Presumably, before attending, they decided that it would be ethically permissible to do so; their subsequent unwillingness to criticize the programs and, in many cases, their praise of the programs and attendance of multiple programs, suggests that they adhered to this view afterwards. This is also the apparent understanding of institutions of the judiciary, such as a panel of the Second Circuit which recently held that a district judge who had attended an expenses-paid environmental seminar may continue to preside over an environmental lawsuit.<sup>238</sup>

Some critics of the judicial seminars have argued that insofar as existing judicial regulation permits judges to participate in these programs, the regulation is inadequate. This argument is implicit in proposals for congressional legislation to limit federal judges' participation in such programs.<sup>239</sup> The argument has been explicitly made by Community Rights Counsel,<sup>240</sup> which particularly takes issue with the United States Judicial Conference's Opinion 67.<sup>241</sup> CRC raises two principal criticisms. First, it contends that the standard set by the opinion, which is based on such undefined terms as "source of funding" and "involved in litigation," is unduly vague.<sup>242</sup> Second, it argues that the opinion requires individual assessments that are too burdensome for individual judges to make.<sup>243</sup> Examples include assessments about the seminar's sponsor, its funding, the content of the seminar, and whether the seminar, its sponsor or its funders have any relationship to litigation that has been or may be brought before the particular judge.

CRC's criticisms of the framework of judicial regulation, at least in general terms, are not particularly compelling. It is in the nature of judicial ethics that the applicable rules are vague and that individual judges are primarily responsible for applying them. The standard of judicial conduct must be open-textured because there is no way to draw a clear line between proper and improper extra-judicial conduct, including educational programs that judges may

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238. *In re Aguinda*, 241 F.3d 194 (2d Cir. 2000); see also *supra* text accompanying notes 105-23.

239. See *supra* text accompanying note 15.

240. See *supra* text accompanying notes 11-12.

241. See *supra* text accompanying notes 68-77.

242. DOUG KENDALL, CMTY. RIGHTS COUNSEL, NOTHING FOR FREE: HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC'S TRUST 92 (2000).

243. *Id.* at 93.

and may not attend in particular.<sup>244</sup> Further, given the variety of opportunities available to different judges over time and variations among caseloads, the decision whether a particular judge may attend any particular program or engage in other extrajudicial conduct must, in the end, be resolved by the judge based on a variety of individual facts.

The more compelling criticism is that the traditional judicial regulatory framework fails to address a unique problem posed by the judicial seminars sponsored by LEC, LOEC, and FREE. Because these seminars are exclusively designed for, and open to judges, and offered on an ongoing basis, they have a potential impact on decision making by judges not only individually but collectively. In effect, the three institutions appear to have privatized judicial education. Consequently, their programs pose a risk not only to public confidence in the integrity of individual judges, which judicial ethics regulation addresses reasonably well, but also a risk to public confidence in the judiciary as an institution. Judicial regulation fails to take account of the latter problem, created by the aggregation of potentially small influences on individual judges.

To illustrate the incompleteness of existing regulation, consider the following three hypothetical programs. The first two pose individual problems of the type that the judicial ethics rules address; the last one poses a problem, like the one posed by the law-and-economics seminars, that is not adequately addressed by current regulation.

First, consider the paradigmatic Continuing Legal Education (CLE) Program. A law school or bar association, whose primary goals do not include educating judges, organizes an educational program on a subject—say, law and economics—that is meant for lawyers generally. The program will be offered on a one-time-only basis in a resort setting and is funded by several corporations. Judge is invited to attend at the expense of the sponsoring entity.

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244. See *supra* note 156; see also Ariz. Sup. Ct. Judicial Ethics Advisory Comm., Op. 00-02 (Apr. 9, 2000) ("No advisory opinion can replace common sense. A judicial officer needs to be sensitive to the issues presented by an invitation to attend a conference at reduced expenses or expense free. An advisory opinion cannot anticipate all the varying circumstances that can be presented."); Advisory Comm. on Judicial Conduct of the District of Columbia Courts, Op. 4 (Feb. 22, 1994) ("the sheer number of [bar-related] organizations [is] so large, and the publicly declared organizational missions and memberships of such organizations [is] so diverse, that it would be futile to develop a blanket rule with regard to judicial attendance at all specialty bar-related functions").

In this case, the propriety of Judge's attendance depends on whether Judge's attendance will undermine public confidence in the integrity of her future work as a judge. That is the question on which judicial regulation focuses. One relevant consideration is whether the sponsor or one of the corporate funders is presently appearing or is likely to appear before Judge, in which case there is a need to assess the risk that Judge will favor the entity out of gratitude. Another is whether the program will specifically address a particular lawsuit that is or may be before Judge, in which case the risk must be assessed that Judge will receive a one-sided version of facts outside the context of a judicial proceeding. Absent either of these problems, Judge's attendance would ordinarily be permissible. Judicial regulation is not particularly concerned with the risk that the program will influence Judge's philosophy in general terms, and rightly so. This program is unlikely to be designed specifically to influence Judge, since the sponsoring entity is not primarily concerned with judicial education and the program itself is geared to a much larger audience comprised overwhelmingly of non-judges. Further, since the program is offered only once, it is unlikely to be Judge's only source of education on the subject; Judge will have to look elsewhere for further education on law and economics.

Next, consider the alternative of an imagined Individual Judicial Tutorial: An entity is formed for the explicit purpose of teaching Judge about law and economics and obtains corporate funding to do so. It designs a program in law and economics that will involve a series of tutorials offered by distinguished academics in the field. The entity invites Judge to participate in the tutorials, which will be offered in a resort setting. The entity will bear the expenses.

This alternative poses the same risks as the CLE Program—the risk that a particular entity—either the sponsor or a funder—may influence how Judge decides a particular case, either because Judge may be grateful to one of those entities when it becomes a party to a lawsuit or because, through the tutorials, one of these entities may expose Judge to a one-sided version of facts relating to a particular litigation. However, the Individual Judicial Tutorial also poses, far more substantially than the CLE Program, the further risk that the Judge's judicial philosophy will be influenced in a particular direction of importance to the corporate funders. Since the sponsor's purpose is explicitly to educate Judge and the tutorials are designed exclusively for Judge, the public would fairly infer that the tutorials will be designed with an eye toward shaping

Judge's general approach to a class of legal issues that the corporate funders face. Further, because the tutorials are ongoing, Judge is unlikely to look elsewhere for education on the subject. Given the exclusive nature of the tutorials, members of the public have no opportunity to assuage their concerns about these risks. Almost certainly, the Individual Judicial Tutorial would be thought to create an "appearance of partiality" and therefore, unlike the CLE Program, be deemed impermissible under existing judicial regulation. The essential problem that the tutorials pose—namely, that a judge's participation in the tutorials may undermine public confidence in the integrity of the individual judge—is clearly addressed by the existing regulation.

Finally, consider the alternative of Privatized Judicial Education. A group of corporations funds an entity for the purpose of educating as many members of the judiciary as possible, on an ongoing basis, on the subject of law and economics. The entity creates programs exclusively for judges and the programs are presented at resort settings at the entity's expense. Many judges attend and some attend repeatedly. This is essentially the model of LEC, LOEC, and FREE.

Like the CLE Program and the Individual Judicial Tutorial, Privatized Judicial Education poses risks from the perspective of individual judges. These risks are addressed by the judicial regulation. One might argue that Privatized Judicial Education has some of the same vices as the Individual Judicial Tutorial, since it is open exclusively to judges, designed for judges, and ongoing. But from the individual judge's perspective, Privatized Judicial Education probably looks more like a garden-variety CLE Program. Attendance ordinarily does not pose an unreasonable risk to public confidence in the integrity of any individual judge. Given the ability of judges to think critically about what they learn, and the availability of other sources of learning, it is unlikely that any one program will significantly influence any given judge's views on the law in a direction that matters to any particular litigation involving a corporate funder. In any event, the risk that the public will infer that some group of potential parties is influencing the particular judge's decision making in their favor, and that the public will therefore lose confidence in the individual judge's impartiality, may be outweighed by the strong public policy in favor of judicial education.

Privatized Judicial Education, however, poses an additional risk. The public may infer that many judges are being influenced in little ways over time. The private entity can essentially take over the

field of judicial education on the subject of law and economics and will therefore be able to influence the judiciary as a whole to adopt a philosophy that favors the corporate funders. Those with a competing view of law and economics—*e.g.*, individuals who may be adverse to corporations—cannot afford to establish an entity to offer expenses-paid education from a competing perspective. Further, because many judges are being educated from the same perspective, the opinions and other writings produced by individual judges who are influenced by the programs will, in turn, influence judges who have not attended. The risk is diminished confidence not simply in the integrity of any individual judge but in the integrity of the judiciary as an institution. This is a problem of institutional policy, not ethics. The problem is the appearance that private corporations with a conservative ideology have taken over judicial education in an area that has considerable impact on a class of cases involving corporate interests, and that this education is having a large impact on decision making by the judiciary as a whole, if not by judges individually. Existing judicial regulation does not address this problem posed by collective action by members of the judiciary. The regulation focuses on problems of individual judges' ethics, not problems of institutional integrity.

Individual judges, as a matter of individual discretion, might decline to take advantage of Privatized Judicial Education in order to preserve public respect for the integrity of the judiciary. But no individual judge has an incentive to do so. If an individual judge refrains from participating, public respect for the judiciary is preserved little if at all. If there is, in fact, a public perception that the philosophy of the judiciary is being reshaped by private interests because judges are attending these programs *en masse*, that perception will not be mitigated simply because a particular judge stays home. At the same time, that judge will be depriving himself of an otherwise desirable opportunity to rub elbows with other judges and learn an important subject from knowledgeable academics in a resort setting. To put it somewhat differently, public respect for the judiciary as an institution is a common asset. Those judges who participate in Privatized Judicial Education slightly diminish public respect for the judiciary but do not take this external cost into account, because they are motivated to take account of only the cost to themselves of not attending. But all the little harms to public confidence add up. The question this raises is whether the aggregate harm caused by the drop in public confidence outweighs the public benefit of a better educated judiciary.



Since institutional questions of this nature cannot be addressed effectively by individual judges either by application of existing regulation or as a matter of individual discretion, the question should be addressed institutionally. Representative bodies of the judiciary, especially the Judicial Conference of the United States, are the preferable institutions for several reasons. First, there is a tradition of judicial self-regulation, which in part reflects concerns about separation of powers. Second, the judiciary, through the adoption of additional judicial ethics rules or through the expansion of the self-regulatory process, is capable of addressing the question of judicial education with subtlety and with respect for relevant competing considerations. Congressional legislation, in contrast, might lack such subtlety and respect.

The Judicial Conference should formally examine the question of judicial education in a manner that includes input from bar associations, legal academics, and others who may have relevant views. Traditionally, the development of ethics rules, including the rules of conduct for judges, has involved a broadly inclusive process;<sup>245</sup> in addressing what is essentially a new question in institutional ethics, institutions of the judiciary should proceed in a similar fashion.

The judiciary may decide in the end to approve judges' participation in judicial seminars because the risks to judicial integrity are outweighed by the interest in judicial education; if so, an explanation of why it reached that conclusion may help blunt criticisms. Alternatively, after study and public comment, the judiciary may reach the opposite conclusion and opt to restrict judges' attendance. There are, of course, many intermediate alternatives. The judiciary may adopt guidelines that judicial seminars, and entities providing them, must follow in order for judges to be permitted to attend. It may condition judges' attendance on the sponsoring institutions' agreement to permit some oversight by a representative body or on the involvement of such a body in planning the seminars to ensure that they are high quality and that they satisfy standards of academic integrity. Whatever the judiciary ultimately concludes should have greater legitimacy because of the institution's full and open deliberations.

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245. *See supra* text accompanying notes 49-53.

### CONCLUSION

Over the past two decades, hundreds of judges have attended expenses-paid law-and-economics seminars sponsored by private entities that receive funding from corporations and conservative foundations. Judges have been criticized for doing so. Although their participation does not run afoul of existing judicial ethics rules, that is, in part, because of the incompleteness of the current framework of judicial regulation. Judicial ethics rules address problems confronted by individual judges, not by the judiciary as an institution. But the judicial seminars pose an institutional problem, not just an individual one. If a single judge went to a single program, no matter how biased, few would care. The public's concern is that federal and state judiciaries are being transformed as institutions, as private entities with a conservative ideological cast have coopted the process of educating judges. The appearance, if not the reality, is that, by taking over the function of judicial education, these private entities have greatly influenced decision making by the judiciary as a whole, if not by all judges individually, in a direction favorable to the legal interests and preferences of the corporations that fund the programs. Whether the concern is a fair one is debatable. But it seems clear that this is a concern that the judiciary ought to address on an institutional basis.

